IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-599

PARKHILL-GOODLOE COMPANY, INC. and
THE HOME INSURANCE COMPANY,
Petitioners,

versus

RUDOLPH McINTOSH (Claimant), DIRECTORS OF THE OFFICE OF WORKERS COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, and U.S. DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD, and U.S. DEPARTMENT OF LABOR, ESA-OWCP,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioners, PARKHILL-GOODLOE COMPANY, INC. and THE HOME INSURANCE COMPANY, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the proceeding on April 1, 1977.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, Parkhill-Goodloe Company, Inc. and The Home Insurance Company, Petitioners v. Rudolph McIntosh and Directors of the Office of Workers Compensation Programs, U.S. Department of Labor, and U.S. Department of Labor, Benefits Review Board, and U.S. Department of Labor, ESA-OWCP, Respondents, 550 F.2d 1283 (5 Cir., 1977) is appended hereto (United States Fifth Circuit No. 76-2918, April 1, 1977). The Order of the United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing and Petition for Rehearing En Banc, 554 F.2d 475 (5 Cir., 1977) entered May 31, 1977, is also appended to this Petition.

The Benefits Review Board entered a Decision dated May 17, 1976, Rudolph McIntosh, Claimant/Respondent, v. Parkhill-Goodloe Company, Inc. and The Home Insurance Company, Employer/Carrier, Petitioners, finding as a matter of law that the barge was in navigation and disagreed with (reversing) the Administrative Law Judge's finding that the barge was not in navigation, and then, nevertheless, affirmed the Supplemental Decision and Order of the Administrative Law Judge dated October 29, 1975. Said Decision of the Benefits Review Board is appended to this Petition.

The Administrative Law Judge entered his Decision and Order on September 8, 1975, in the matter of Rudolph McIntosh, Claimant, and Parkhill-Goodloe Company, Inc., Employer, and The Home Insurance Company, Carrier, and entered a Supplemental Decision and Order dated October 29, 1975, revoking in its entirety the original Decision and Order dated September 8, 1975. Both the original Decision and Order dated September 8, 1975, and the Supplemental Decision and Order dated October 29, 1975, of the Administrative Law Judge are appended to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 1, 1977. The Order denying the Petition for Rehearing and the Petition for Rehearing En Banc was entered on May 31, 1977. This Petition for Writ of Certiorari was filed within 90 days of May 31, 1977, and the extension granted by the Supreme Court. A copy of said Order of the Supreme Court is appended to this Petition. This Court's jurisdiction is invoked under 28 USCA, Section 1254(1) and Section 2101, and United States Supreme Court Rule 19, 28 USCA.

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit erred in not finding as a matter of law that Captain McIntosh was on board (the barge) primarily to aid in navigation when the only competent substantial evidence in the record clearly demonstrated as a matter of law that Captain McIntosh was the master or member of a crew of a vessel and, therefore, was excluded from the Longshoremen's and Harbor Workers' Compensation Act.

2. Whether the United States Court of Appeals for the Fifth Circuit erred in affirming the Decision of the Benefits Review Board and the Decision of the Administrative Law Judge when, as a matter of law, Captain McIntosh was engaged primarily in navigation and in commanding navigation of the vessels and commanding the crew, i.e. the tug captain/boatman and deckhands.

STATEMENT OF CASE*

The Petitioner, Parkhill-Goodloe Company, Inc. (and The Home Insurance Company), was a marine dredging company, owning dredges, barges, tugboats, skiffs, etc., and, of course, The Home Insurance Company insured Parkhill-Goodloe Company, Inc. Respondent, Captain Rudolph McIntosh, was employed by Parkhill-Goodloe Company, Inc. as a deck captain and had been a captain of a dredge, and in the course of his employment with Parkhill-Goodloe Company, Inc., Captain McIntosh had worked his way up from a deckhand to a captain commanding crew members of certain vessels.

Parkhill-Goodloe Company, Inc. had a contract under a permit from the Corps of Engineers to clear and dredge the Altamaha River, including the Tom's Creek Cut, so that a nuclear reactor could be moved up the river.

Captain McIntosh had boarded one of the vessels and assumed command of the vessel and crew on the

* See facts and excerpts from testimony in Appendix.

Altamaha River prior to the arrival of the vessels and crew at the Tom's Creek Cut.

Tom's Creek Cut was accessible only by water, and the only means of transportation used by Captain McIntosh and his crew were boats, and had been boats the entire time they were on the Altamaha River, to-wit: approximately two weeks before Captain McIntosh's accident.

Captain McIntosh was in command and directed the activities of the crew, i.e. the deckhands, tug captains and the movement of the vessels, the entire time he was on the Altamaha River, including the day of and at the moment of his accident.

There is no question that these vessels, the barge, the tug, and the skiff, were in navigation as found as a matter of law by the Benefits Review Board, reversing the finding of the Administrative Law Judge in that respect. There is also no contradiction that Captain McIntosh directed the movement of the barge, tug and skiff and was in command the entire time.

Captain McIntosh gave commands to the crew members by oral command and hand signals.

As was asked by the Administrative Law Judge, and there was no contradiction of the answer which he received that the tug was constantly maneuvering the barge, and there is no question that Captain McIntosh was in command and directed every movement of the continuous maneuvering.

"JUDGE SULLIVAN . . . So, it was a matter of continuously maneuvering this barge by use of the tug to positions where it could extract these snags or trees or whatever. Is that correct?

THE WITNESS: That's correct."

The voice commands and hand signals from Captain McIntosh were all made from and received by the tug captain and the deckhands by Captain McIntosh from the deck of the barge. All such commands, directions and maneuvering took place on the water on the deck of the barge and were received by the tug captain and deckhands on the water, either on the tug, the skiff, or the barge.

The tug, the barge and the skiff had been navigated by the command of Captain McIntosh from the day he arrived on the Altamaha River approximately 35 miles downstream, and included the movement of the tug, the barge and the skiff up and down the Altamaha River (Tom's Creek Cut) four or five times, and partial trips up and down Tom's Creek Cut about twelve times, all of which required the constant maneuvering of the vessels, and not any movement was made without the command, direction and order of Captain McIntosh.

The tug captain did not move or maneuver the barge or the tug unless he was directed to do so by Captain McIntosh. Captain McIntosh testified himself that this was the fact, and so did all witnesses, without exception.

Captain McIntosh had directed the activities, movement and maneuvering of the skiff, tug and barge the day of the accident and was doing so at the time he was injured. There is absolutely no testimony to the contrary. Captain McIntosh was injured on board the barge when he was directing the movement of the barge and the tug, and either slipped or fell, and was struck by a log on the said barge.

The above facts were ignored by the Administrative Law Judge, including the answer to the question posed by him concerning the constant navigation of the vessels by Captain McIntosh. The Benefits Review Board did correct the Administrative Law Judge when he found that the vessels were not in navigation, but failed to correct and follow the facts which they should have done as a matter of law, and found that Captain McIntosh was primarily on board the vessel to aid in the navigation of said vessels, and hence, was a master or member of a crew of a vessel and excluded from the Longshoremen's and Harbor Workers' Compensation Act.

The United States Court of Appeals for the Fifth Circuit simply took the position that the Benefits Review Board had not reversed the Administrative Law Judge as a matter of law on the question of Captain McIntosh being on board the vessels to primarily aid in their navigation, and took the position that if the Benefits Review Board did not reverse the case then they should not reverse the case, and so stated from the bench. This does not alter the facts, however, and as a matter of law, anyone, including the Administrative Law Judge, the Benefits Review Board, the United

States Court of Appeals for the Fifth Circuit, or this Court, the Supreme Court of the United States, should find, as a *matter of law* that Captain McIntosh was on board the vessels primarily to aid in their navigation, and was a master or member of a crew of a vessel and was, thereby, excluded from the Longshoremen's and Harbor Workers' Compensation Act.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Federal Jurisdiction in the Court of First Instance is based upon the fact that the Claimant (Captain McIntosh) brought a claim under the Federal Longshoremen's and Harbor Workers' Compensation Act, Title 33, USCA Section 901 et. seq.

REASONS FOR GRANTING THE WRIT

1. There is no competent substantial evidence in the record or reasonable basis from the record that Captain McIntosh was not aboard the barge and other vessels primarily to aid in navigation, and the Administrative Law Judge (and Benefits Review Board) erred as a matter of law in finding that Captain McIntosh was not a member of a crew of a vessel (master or seaman or crewman) despite the undisputed facts in the record to the contrary, and the United States Court of Appeals for the Fifth Circuit erred in affirming such decision.

2. The Administrative Law Judge erred as a matter of law when he failed to find that Captain McIntosh was engaged primarily in navigating and commanding the navigation of the vessels and commanding the crew, i.e. the tug captain-boatman and deckhands and the Benefits Review Board and the United States Court of Appeals for the Fifth Circuit erred in affirming the Administrative Law Judge.

These reasons will be argued together for continuity, clarity and to avoid repetition.

Captain McIntosh was the master or a member of a crew of a vessel and in command of a crew, i.e. deckhands, tug captain-boatman, commanding and ordering the crew in the movement of the vessels, to-wit: the barge, the skiff and the tug, all the time the said vessels and Captain McIntosh were on the Altamaha River, Tom Creek's Cut. These vessels, under Captain McIntosh's constant command (they did not move without Captain McIntosh's voice command or hand signals), were in constant navigation and constantly being maneuvered, and the reviewing court, to-wit: the United States Court of Appeals for the Fifth Circuit, should have found as a matter of law that Captain McIntosh was on board the vessels primarily to aid in navigation and had a significant navigational function, and as such, was the master or member of a crew of a vessel which excludes Captain McIntosh from the Longshoremen's and Harbor Workers' Compensation Act.

This Court, the United States Supreme Court, so held in affirming the Circuit Court of Appeals, Third Circuit, *Warner Co. v. Norton, et al*, 137 F.2d 57, affirmed by the Supreme Court, 321 U.S. 565, 64 S.Ct. 747, 88 L.ed. 931. The opinion of the Court of Appeals said: (p. 58)

" 'While the question as to whether a particular claimant is 'a master or member of a crew' of a vessel and therefore excluded from the Compensation Act is one of fact, it is necessarily an ultimate conclusion to be derived from an application of the statute to the basic findings of fact. As such, it is open to court review for a determination of its validity on the basis of the supportable facts as found by the Commissioner. In short, a *Commissioner's conclusion that one is or is not 'a master or member of a crew' is not binding upon a reviewing court if the basic facts competently found by the Commissioner rightly call for a different conclusion.'* " (Emphasis Supplied)

This Court, the Supreme Court of the United States, held that the Deputy Commissioner's conclusion that Rusin was not a master or member of a crew of a vessel was certainly reviewable by this Court, the Supreme Court of the United States, and the Supreme Court of the United States, in affirming the Circuit Court of Appeals, held as a matter of law that the injured bargeman was a member of a crew of a vessel and that he fell within the exclusion of the Longshoremen's and Harbor Workers' Compensation Act and was not entitled to those benefits.

It is also interesting to note that this Court held that members of the crew are not confined to those who "hand, reef and steer".

The case of Captain McIntosh being the master or member of a crew of the vessel is one hundred percent

stronger than is the case involving Seaman Rusin. Captain McIntosh was on board the vessels which were in constant navigation, and Captain McIntosh was the one giving the orders and commands to keep the vessels in constant navigation and movement. Captain McIntosh gave the orders to the deckhands and gave the orders to the tug captain-boatman in every movement of the tug and the barge which were in constant navigation. On the other hand, Rusin could not set course or control or change it at any time; he was subject to the order of respondent's marine superintendent except when in tow, at which time he was subject to the control of the tugboat captain-boatman. Captain McIntosh, on the other hand, told the tugboat captain-boatman what to do, when to do it, how to do it, and where to do it, all with his voice and hand commands, in the movement of the vessels under his command and direction and the crew members thereof on navigable waters.

It is respectfully submitted that this Supreme Court decision alone not only warrants, but requires, the granting of the Petition for Certiorari herein and the reversal of this case.

Not only does the decision of the United States Court of Appeals for the Fifth Circuit conflict with the above cited Supreme Court decision, but it also conflicts with the decisions of other courts of appeal from other circuits, and as we will point out later, conflicts with its own decisions.

In *Lawrence v. Norfolk Dredging Company*, 319 F.2d 805, (4 Cir.) the plaintiff instituted an action under the

Jones Act. He, much like Captain McIntosh, had started as a deckhand and was promoted to a deck captain. While working on a derrick barge, the plaintiff was seriously injured when a 1500 pound anchor fell across his legs.

Plaintiff was paid on an hourly basis; after working hours he could go and come as he pleased; he did not go to seaman's school and did not have seaman's papers; his primary duty was to handle and care for the conveying of pipe lines; the dredge to whch he was attached had no motive power, no wheel, no rudder, no running lights, never ventured into the ocean and was operated without the maintenance of a log; in connection with his work he sometimes assisted in building up land areas for highways and other construction, assisted in maintaining levies, spill ways and pontoon lines; and when he ate and slept aboard the dredge, there was deducted from his wages the sum of $1.00 a day for his food and for the use of towels and sheets.

In *affirming* the District Court, *which held as a matter of law that the plaintiff was a member of a crew of a vessel,* the Court of Appeals stated: (p. 808):

> "We feel that our disposition of this question in the *instant case is controlled by the Supreme Court decision in Norton v. Warner Co.*, 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 430 (1944), wherein *the Court held that as a matter of law the injured employee was a member of a crew.* The only apparent difference between Norton and this case before us is that in the former the injured employee received his

compensation on a monthly rather than on an hourly basis and performed somewhat less varied duties. There, as here, *the vessel was a barge, had no motive power, the employee bought his own meals, had little experience as a seaman and had only incidental navigational duties* such as handling lines, responding to the whistles of tugs and posting navigational lights and signals, while his main duties consisted of taking general care of the vessel. Of course, the fact that the "Talcot" had no motive power, no wheel, no rudder, etc., are not strictly pertinent here since it is not disputed that the dredge was a 'vessel'."

* * *

"In the instant case plaintiff's duties were connected with and contributed to the operation and welfare of the dredge when it was engaged in its assigned function. To paraphrase the language of the Court in the Norton case, 321 U.S. at 573, 63 S.Ct. at 751, we conclude that only by a distorted definition of the word 'crew' as used in the Compensation Act could Lawrence be restricted to the remedy which that Act affords and be excluded from recovery under the Jones Act or be denied relief in admiralty.

"We conclude that the *District Court did not err in holding,* as a matter of law, that *plaintiff was a* member of the crew." (Emphasis Supplied)

The Petition for Writ of Certiorari was denied by the Supreme Court in *Norfolk Dredging Company v. Lawrence*, 375 U.S. 952, 83 S.Ct. 443.

An additional case conflicting with the decision of the Fifth Circuit Court of Appeals is that of *Summerlin v. Massman Construction Co.*, 199 F.2d 715 (4 Cir.), wherein an action was brought under the Jones Act and the defendants defended on the ground that the plaintiff was not a seaman within the meaning of the Jones Act and that the floating derrick on which he was employed was not a vessel engaged in navigation. Defendants alleged that the structure was a crane or derrick which was anchored in the river and was engaged in pouring concrete into certain forms incident to the building of a bridge across the river; and that the plaintiff was not employed as a member of the crew of a vessel, but was employed to perform the duties of a fireman on the crane or derrick, and such other duties as the defendants might assign to him in the building of the bridge.

The barge on which the crane was erected had no motive power of its own and no sleeping quarters. The barge was moved in the water from time to time to facilitate the work during construction of the bridge. (The barge in Captain McIntosh's case was constantly moved and navigated during this channel clearing by Captain McIntosh and his crew, deckhands, tug captain-boatman.)

The District Court denied the suit of the plaintiff and based its opinion entirely on the ground that the plaintiff was not a seaman or a crew member injured upon a

vessel engaged in navigation on navigable waters at the time of his injury.

The Court of Appeals *reversed the District Court and held as a matter of law that the plaintiff was a seaman or crew member* and stated: (p. 716):

> ". . . we find ourselves in disagreement with the conclusions of the court. The case cannot be distinguished on this point from that considered by us in Jeffery v. Henderson Bros., 4 Circ., 193 F.2d 589, where employees on a coal cleaning barge, which had been libelled by material men, filed wage claims that were held to be prior to the claim of a mortgagee. The barge was furnished with machinery and equipment for cleaning and screening coal. It was without motive power of its own but had been moved close to the shore on the Monogahela River in West Virginia and kept in place by mooring lines and spuds. The machinery was used to lift coal from refuse piles along the river bank to the barge where it was cleaned and transferred to barges for transportation and sold. The wage claimants were primarily engaged in the coal cleaning operation. *Their maritime activities were reduced to a minimum consisting for the most part in assisting in moving the barge along the shore when necessary and transferring the cleaned coal to other vessels.* We held, after reviewing the pertinent authorities, that *the employees were seamen employed on a vessel engaged in maritime operations* and were therefore entitled to a maritime lien for

wages. *The similarity between these facts and those in the pending case needs no comment,* and *we conclude that the plaintiff's claim falls within the scope of the Jones Act . . .*" (Emphasis Supplied)

In *Captain McIntosh's case, the barge was not kept in place by mooring lines and spuds down on the bottom and was not in a more or less permanent location, but was constantly being navigated* and moved during the channel clearing with the tug which was tied to the barge and controlling the movements of the barge never ceasing to run during a days' operation. Likewise, the barge, *in Captain McIntosh's case,* was not anchored in the river, and Captain McIntosh was not employed to perform the duties of a fireman on a crane or derrick, but Captain McIntosh was in the command of the barge, tug and skiff, all of which were mobile and which were constantly being maneuvered and navigated by Captain McIntosh (his only duties) in clearing the channel in aid of navigation. So there is no question, and can be no question, that Captain McIntosh was the master or member of a crew of a vessel, and the United States Court of Appeals, Fifth Circuit, should have so held as a matter of law just as the United States Court of Appeals, Fourth Circuit, held here as a matter of law.

The decision of *Tucker v. Branham,* 151 F.2d 96 (3 Cir.), is another decision in direct conflict with the Court of Appeals, Fifth Circuit, in the McIntosh case. In the *Tucker* case, a claim was made under the Longshoremen's and Harbor Workers' Compensation Act for the decedent Dillon's minor grandchildren as a result of his accidental death.

The Deputy Commissioner found the decedent for about ten years prior to his death was employed on the barge "Army" as a caretaker, that it was his duty when excessive leaking occurred to attend to and supervise the loading and unloading thereof, to fasten and unfasten lines, if necessary, and at all times to protect the barge from damage and otherwise safeguard the interests of its owner; that he was the only person employed thereon; that he lived, ate and slept on the barge and brought his own meals; that he was not qualified or a licensed seaman and held no seaman's papers; said barge had no motive power of its own, was towed by tugboats; that its operations were confined principally to the Philadelphia Harbor; that the duties performed by the deceased did not relate principally to the navigation of the said barge, but on the contrary, his duties had substantially no relation to navigation, being principally the duties incident to common labor and custodial services; and that the decedent was *not a master or member of a crew* within the meaning of the Longshoremen's and Harbor Workers' Act, his status being that of a laborer or harbor worker.

The Deputy Commissioner found that the decedent was within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act and awarded compensation.

The District Court below, in reversing the Deputy Commissioner, *concluded* that the *Deputy Commissioner's finding* that Dillon was not a master or member of a crew, within the purview of Section 3(a)(1) of the Longshoremen's and Harbor Workers' Compensation Act, *was not supported by any evi-*

dence adduced before him and hence was not in accordance with law.

The Court of Appeals, stated: (p. 97):

> ". . . we construe the decision of the Supreme Court in Norton v. Warner Co., 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931, to mean that if the facts are not in dispute as in the case at bar, the question of coverage by the Act is one of law. *The pertinent question* is whether or not the Deputy Commissioner construed the law correctly. *That question is always within the* purview of a reviewing tribunal." (Emphasis supplied)

The Court of Appeals stated: (p. 97):

> "*We conclude that the Deputy Commissioner did misconstrue the act . . . The barge 'Army' in the instant case is a vessel, despite the fact that it had no motive power of its own. It was a means of transportation on water. Dillon was on board the 'Army' and aided in her navigation as the evidence demonstrates and the Deputy Commissioner found in his second finding of fact . . . The fact that the Deputy Commissioner concluded that Dillon was a caretaker is immaterial. He did take care of the barge but no one fact is conclusive. The purpose of the Longshoremen's and Harbor Workers' Compensation Act* as is pointed out in S.Rep. No. 973, 69th Cong., 1st Sess., p. 16, *was to provide compensation for persons* * * *

> *mainly employed in loading, unloading, refitting, and repairing ships. These persons ordinarily are longshoremen and shipfitters. Dillon was not such . . . Accordingly the judgment of the court below is affirmed."* (Emphasis Supplied)

In the instant case, the finding of the Administrative Law Judge that Captain McIntosh was not a master or member of a crew of a vessel was like the finding of the Deputy Commissioner in the *Tucker* decision, supra, (p. 96):

> ". . . *not supported by any evidence adduced before him and hence is not in accordance with law . . .*" (Emphasis Supplied)

The decision of the United States Court of Appeals, Fifth Circuit, in *Boatel, Inc. v. Delamore*, 379 F.2d 850 (5 Cir.) is in direct conflict with the decision of that Court in the instant case. In the *Boatel* decision, the injured employee was an amphibious worker who was injured on a drilling craft in the Gulf of Mexico off the coast of Louisiana engaged in exploration and development of oil and gas. He was a diesel operator whose primary duties were the care and maintenance of the diesel engines, generators, gauges, equipment and the engine room itself. His work schedule was twelve hours per day for ten days aboard the vessel, then he had five days off duty on shore. Pay was at an hourly rate.

The Deputy Commissioner held that the employee, Delamore, was not a member of a crew of a vessel and that the Longshoremen's and Harbor Workers' Compensation Act applied.

The District Court reversed and remanded the case to the Deputy Commissioner on the question of whether the claimant was a member of a crew of a vessel, and after an evidentiary hearing the Deputy Commissioner again held that the claimant was not a member of the crew of a vessel and that the Longshoremen's and Harbor Workers' Compensation Act applied. The District Court set aside the Deputy Commissioner's order and remanded the matter with instructions to render an order that Delamore was not entitled to the benefit of the Longshoremen's and Harbor Workers' Compensation Act. An appeal ensued to the Fifth Circuit, United States Court of Appeals.

In affirming the District Court, the United States Court of Appeals, Fifth Circuit, held as a matter of law that the Deputy Commissioner's findings were clearly wrong, stating: (p. 857)

> ". . . We conclude under the facts here that *his findings were clearly wrong as a matter of law. Findings of the Deputy Commissioner may be set aside for error of law.* Norton v. Warner Co., 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931 (1944)." (Emphasis Supplied)

In the instant case, it is equally true that the findings of the Administrative Law Judge were clearly wrong as a matter of law, and that the United States Court of Appeals for the Fifth Circuit was clearly in error in not setting aside the findings and conclusions of the Administrative Law Judge for error of law.

In the very recent decision of *Higginbotham v. Mobil Oil Corporation*, 545 F.2d 422 (5 Cir., 1977), the

Court of Appeals, Fifth Circuit, reversed the District Court wherein the District Court held that the deceased employee was not a seaman. The Court of Appeals, Fifth Circuit, held as matter of law that the deceased employee was a seaman and his representatives were entitled to maintain a Jones Act action for his death. The Court of Appeals, Fifth Circuit, stated that they reviewed the evidence on the deceased employee's status and determined therefrom as a matter of law that he was a seaman.

It is respectfully submitted that the United States Court of Appeals for the Fifth Circuit has committed the same error in the instant McIntosh case that it complained of being committed by the District Court in the *Higginbotham* case wherein a misapplication of the law had been made, and the Fifth Circuit Court of Appeals could and should have reversed the McIntosh decision as a matter of law because of the misapplication of the law by the Administrative Law Judge and the Benefits Review Board but failed to follow the decision of this Court, the Supreme Court of the United States, in the *Norton v. Warner Co.* case, supra. See *Boatel, Inc. v. Delamore*, supra, citing with approval *Norton v. Warner Co.*, supra. (requiring a decision to be set aside where the findings were clearly wrong as a matter of law for error of law).

In *Texas Company v. Gianfala*, 222 F.2d 382 (5 Cir.), a suit under the Jones Act alleged that while a seaman and a member of the crew on barge number 76 and engaged in unloading drilling tubing by means of a hydraulic lift the decedent met his death as a result of negligence.

The widow and administratrix of the decedent obtained a verdict and judgment in the trial Court.

The Court of Appeals, Fifth Circuit, reversed the judgment upon its concept that the decedent was a workman aboard a vessel not as a member of ship's crew, but as a member of an oil drilling crew and the vessel at the time of the accident was not in navigation, but was sunken and fast as part of equipment for drilling a well and the workman was handling tubing, a work done strictly only by oil field workers, and he was not a seaman within the Jones Act Coverage.

This decision of the Court of Appeals, Fifth Circuit, was summarily reversed by the Supreme Court of the United States in *Gianfala v. Texas Company*, 350 U.S. 879, 76 S.Ct. 141. The Supreme Court stated: (p. 879):

> ". . . Per Curiam. The petition for writ of certiorari is granted. *The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with directions to reinstate its judgment.* South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732; Summerlin v. Massman Const. Co., 4 Cir. 199 F.2d 175; Wilkes v. Mississippi River Sand & Gravel Co., 6 Cir. 202 F.2d 383; Gahagan Construction Corp. v. Armao, 1 Cir. 165 F.2d 301, 305." (Emphasis Supplied)

This Court, the Supreme Court of the United States, in reversing the United States Court of Appeals, Fifth Circuit, reaffirmed its decision in *Norton Company v. Warner*, supra., and clearly establishes that when a reviewing body, including the United States Fifth Circuit Court of Appeals, fails in its duty to apply the appropriate law or misapplies the law, that this Court, the Supreme Court of the United States, will reverse, as a matter of law findings and conclusions which are clearly wrong as a matter of law and will reverse the findings and conclusions of the Administrative Law Judge, the Benefits Review Board, and the United States Court of Appeals, Fifth Circuit, for error of law. This is the error of which petitioners complain.

CONCLUSION

The Court of Appeals for the Fifth Circuit clearly committed reversible error in rubber stamping the decision of the Benefits Review Board which, without question, committed reversible error in affirming the Administrative Law Judge, wherein the Administrative Law Judge made findings which were obviously wrong as a matter of law, reached conclusions which were incorrect and wrong as a matter of law, not based upon the facts, and by doing so the Administrative Law Judge, the Benefits Review Board and the Fifth Circuit Court of Appeals misapplied the law and committed error of law.

It has been stated in *Warner Co. v. Norton*, supra:

> " '. . . In short, a *Commissioner's conclusion that one is or is not 'a master or member of a crew' is not binding upon a reviewing court if the basic facts* competently found by the Commissioner rightly *call for a different conclusion.'* " (p. 59) (Emphasis Supplied)

As may be paraphrased, in short the Administrative Law Judge and the Benefits Review Board and the Fifth Circuit Court of Appeals misapplied the law, which requires this Court, the Supreme Court, to reverse, as the Administrative Law Judge's conclusion (finding) is not binding upon the reviewing court because the basic facts were not competently found by the Administrative Law Judge and the competent facts rightly call for a different conclusion.

The decisions as set forth in this Petition from this Court, the Supreme Court, and from the decisions of the other courts of appeal from other circuits, and even those from the Fifth Circuit Court of Appeals require a reversal.

The Fifth Circuit Court of Appeals (the panel hearing this case) took the position and made it clear that they did not believe that they had jurisdiction to reverse the Benefits Review Board or the Administrative Law Judge as a matter of law (although there was a misapplication of the law and the competent facts rightly call for a different conclusion) and conclude that Captain McIntosh was a master or a member of a crew of a vessel.

The Fifth Circuit Court of Appeals is not bound by the conclusions and decisions of the Administrative Law Judge and those affirmed by the Benefits Review Board when there has been a misapplication of the law and the cases cited in this Petition clearly require a reversal of the Fifth Circuit Court of Appeals' decision, and once again citing the decision of *Warner Co. v. Norton*, supra, where the conclusions are incorrect, such conclusion or conclusions are not binding upon

this court, or the Fifth Circuit Court of Appeals, and where the competent evidence rightly calls for a different conclusion, as it does in this case, there must be a reversal of the case by this Supreme Court.

Respectfully submitted,
SLATER & RANDLE, P.A.

_____

Richard L. Randle

PROOF OF SERVICE

I, RICHARD L. RANDLE, as attorney for Parkhill-Goodloe Company, Inc. and The Home Insurance Company, Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of October, 1977, I served three copies of the foregoing Petition for Writ of Certiorari on each of the following by mailing said copies in a duly addressed envelope, postage prepaid:

Neil C. Taylor, Esq.
Barnett Bank Building, Suite 1014
Jacksonville, Florida 32202

Edward A. White, Esq.
902 Barnett Bank Building
Jacksonville, Florida 32202

Benefits Review Board
1111 — 20th Street, N.W.
Washington, D. C. 20036

Miss Laurie M. Streeter
Associate Solicitor
U. S. Department of Labor
Suite N-2716, New Labor Building
Washington, D. C. 20210

Mr. Herbert Doyle, Director
Office of Workers' Compensation Programs
U. S. Department of Labor
Suite S-3524, New Labor Building
Washington, D. C. 20210

Hon. Walter J. Sullivan
Administrative Law Judge
U. S. Department of Labor
Suite 700, Vanguard Building
1111 — 20th Street, N.W.
Washington, D. C. 20036

Mr. Robert H. Bergeron
US DOL/ESA/OWCP
400 West Bay Street
P. O. Box 35409
Jacksonville, Florida 32202

Richard L. Randle

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2918

PARKHILL-GOODLOE CO., INC., and
THE HOME INSURANCE COMPANY,
Petitioners,

versus

RUDOLPH McINTOSH, and DIRECTORS OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS, and U.S. DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD, and U.S. DEPARTMENT OF LABOR, ESA-OWCP,
Respondents.

Petition for Review of an Order of the
Benefits Review Board (Florida Case)

(April 1, 1977)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM: Petition for Review Denied and Benefits Review Board AFFIRMED. See Local Rule 21.[1]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

May 31, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-2918 — Parkhill-Goodloe Co., ET AL. v.
Rudolph McIntosh, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

---

1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours.
EDWARD W. WADSWORTH.
Clerk
/s/ SUSAN M. GRAVOIS
Deputy Clerk

cc: Mr. Richard L. Randle
Mr. Edward A. White

DECISION

U.S. Department Of Labor
Benefits Review Board (SEAL)
Washington, D.C. 20210

RUDOLPH McINTOSH
Claimant-Respondent

versus BRB No. 75-263

PARKHILL-GOODLOE COMPANY, INC.

and

THE HOME INSURANCE COMPANY
Employer/Carrier-
Petitioners

Appeal from the Decision and Order of Walter J. Sullivan, Administrative Law Judge, United States Department of Labor.

Edward A. White, Jacksonville, Florida, for the claimant.

Slater and Randle, Jacksonville, Florida, for the employer/carrier.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

This is an appeal by the employer/carrier from the Decision and Order (75-LHCA-526) of Administrative Law Judge Walter J. Sullivan pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the Act).

Claimant was employed by Parkhill-Goodloe, a company which conducts both dredging and snagging operations. On February 12, 1975, claimant was employed as the supervisor of a project clearing Tom's Creek cut-off of logs and debris. This snagging project was directed at facilitating the later passage of a nuclear reactor up the river. The snagging operation involved the use of a crane attached to a barge and a tugboat which maneuvered the barge into position. During the course of this operation, a log previously recovered was dislodged from its pile on the barge and fell onto the claimant. He received crushing injuries to

his chest and back. As a result of this accident, claimant has lost the use of his legs.

The administrative law judge found claimant permanently totally disabled from February 12, 1975, on. Benefits were awarded accordingly.

The employer/carrier (hereinafter referred to as the employer) appeal this Decision and Order contending:

1. The administrative law judge erred as a matter of law in finding that the claimant was not a member of a crew of a vessel.

2. There was not substantial evidence in the record to support the finding of permanent total disability.

3. The company attorney should not have been allowed to participate in the hearing.

4. The unsigned statements of fellow workers introduced into the proceedings by the company attorney should not have been allowed in as evidence.

5. The administrative law judge improperly imposed a 14(e) penalty in that the claim was timely controverted, the employer was denied a hearing on the issue and the calculation of the penalty award was based on the wrong time period.

6. The credit employer was to receive for monies previously paid was left vague and uncertain.

7. The attorney's fee awarded was excessive.

In his Decision and Order, the administrative law judge held that the claimant was an employee within the meaning of Section 3(a) of the Act and not excluded as a member of a crew of a vessel. 33 U.S.C. §903(a). This conclusion was based on his findings that the barge on which claimant was injured was not in navigation and claimant was not engaged primarily in navigation.

In construing the Act, the test of whether an individual is a seaman within the meaning of the Jones Act or a member of a crew within the provisions excluding crew members from coverage under the Longshoremen's Act is whether (1) the vessel is in navigation, (2) the worker had more or less a permanent connection with the vessel, and (3) the worker was aboard primarily to aid in navigation. *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3rd Cir. 1975).

Whether an employee is excluded from the Act as a member of the crew of a vessel depends upon the employee's actual duties on the day on which he is injured. *Long Island R.R. v. Lowe*, 145 F.2d 516 (2d Cir. 1944). The fact that he may have been performing ancillary acts of seamanship, which were incidental and minimal in relation to his primary duties, does not serve to make him a member of the crew. *Travelers Insurance Co. v. Belair*, 290 F. Supp. 221 (D. Mass. 1968), *aff'd*, 412 F.2d 297 (1st Cir. 1969).

In an appeal from findings of fact ascertaining the status of a worker as a "member of a crew of any vessel" under the Act, the Board is limited to determining whether the fact-finder acted in such a manner so as to have a reasonable basis for his conclusions. This determination is not dependent upon whether or not the appellate body agrees with the fact-finder's estimate. *Senko v. LaCrosse Dredging Co.*, 352 U.S. 370 (1957); *Hardaway Contracting Co. v. O'Keeffe*, 414 F.2d 657 (5th Cir. 1968).

As a matter of law, the Board disagrees with that part of the administrative law judge's decision holding that the barge was not in navigation. The barge upon which the claimant was working was a vessel within the meaning of the Act. *Norton v. Warner Co.*, 321 U.S. 565 (1944). Furthermore, this vessel was in navigation. The "in navigation" requirement is used in a broad sense and is not strictly confined to the actual navigating or movement of the vessel, but instead means that the vessel is used as an instrument of commerce or transportation on navigable waters. *Griffith v. Wheeling Pittsburgh Steel Corp., supra*; 2 M. Norris, THE LAW OF SEAMEN, §668 at 301 (3d ed. 1970). Certainly, this barge, having been in constant movement throughout the snagging operation, falls within this broad definition of "in navigation".

However, the Board finds that there is substantial evidence to support the administrative law judge's determination that McIntosh was not aboard primarily to aid in navigation.

The tug pilot, not McIntosh, had brought the barge up river from the company's main base. McIntosh

joined the tug and barge approximately 20-35 miles from the situs of the snagging operation. At the situs, while McIntosh gave hand signals which were directed at regulating the leverage on the trees being uprooted, McIntosh's primary duty was to supervise the workers engaged in the snagging operation. His function and the function of the other employees with the exception of the tug operator was to clear a path to get a nuclear reactor upstream to its destination. Although the results of his duties may have made the river easier to navigate, he was not aboard primarily to aid in navigation.

Therefore, the Board finds the record supports the administrative law judge's conclusion that McIntosh was not a member of a crew so as to be excluded from coverage under Section 2(3) of the Act.

The Board also finds that there is substantial evidence in the record to support the administrative law judge's finding that the claimant is permanently totally disabled even though claimant's testimony was the only evidence submitted on the question of the extent of claimant's disability.

Nothing in the Act requires a claimant to produce medical testimony to establish a compensable disability. *Woodham v. U.S. Navy Exchange*, 2 BRBS 185, BRB No. 75-105 (Aug. 20, 1975). The administrative law judge is permitted to rely on his own observations. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). In determining the extent of claimant's disability, such factors as claimant's age, industrial history and the availability of that type of work which he can do

must be considered. *American Mutual Ins. Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). In addition, in cases involving a claim for permanent total disability, the employer must introduce evidence of the employee's actual opportunities to obtain other work. *Offshore Food Service v. Murillo*, 1 BRBS 9, BRB No. 141-73 (May 15, 1974), *aff'd sub. nom., Offshore Food Service v. Benefits Review Board*, 524 F.2d 967 (5th Cir. 1975).

In this case, there was claimant's own testimony that he is a paraplegic plus the administrative law judge's observation of the claimant's appearance and physical mobility at the hearing. Testimony as to the claimant's age and industrial history was also received. Furthermore, the employer could have had the claimant examined pursuant to Section 7(a) of the Act. 33 U.S.C. §907(a). The employer also failed to submit any evidence on claimant's alternate employment opportunities. In total, there is clearly substantial evidence in the record considered as a whole to support the administrative law judge's finding.

Further, the Board holds that the administrative law judge did not err in allowing the company attorney (employer's own attorney) to participate in the hearing over the objections of the attorney for employer's insurance carrier.

Regulation §702.339 states that an administrative law judge is not bound by technical or formal rules of procedure except as provided by 5 U.S.C. §554. It is provided in 5 U.S.C. §554(c) that an agency shall give all "interested parties" opportunity to submit facts

and arguments. Surely, the company attorney represents an interested party under the Act. As long as the company attorney had authorization from his employer to appear at the hearing, and the transcript here indicates that the administrative law judge had reasonable cause to find such authorization, the administrative law judge's recognition of him was in accordance with law.

The Board also holds that the admission into evidence of the unsigned statements of fellow workers was proper.

Both under the Administrative Procedure Act which applies to these hearings and under the Rules and Regulations of the Longshoremen's Act, evidence is not because of its nature as hearsay automatically inadmissible in hearings. 5 U.S.C. §556(d); 20 C.F.R. §702.339. However, the administrative law judge's findings cannot be based solely on hearsay. 6 A.L.R. Fed. §769 (1971). These statements were not the sole basis for the administrative law judge's decision. Further, the attorneys had full opportunity to cross-examine the individuals making these statements thus qualifying this hearsay under the Supreme Court's ruling in *Richardson v. Perales*, 402 U.S. 389 (1971).

The Board finds that the administrative law judge properly assessed a penalty for late controversion of a claim under Section 14(e) of the Act, 33 U.S.C. §914(e). Further, employer has not been denied due process in not having a hearing on this issue.

At the hearing, employer stated that it had timely controverted the claim. The administrative law judge in his decision in awarding a 14(e) penalty noted that the record did not show timely controversion. Upon a motion for reconsideration, the administrative law judge received into evidence the employer's notice of accident form. Having before him this form and the notice of controversion, the administrative law judge concluded that the claim was not timely controverted. Under such circumstances, a formal hearing on this matter was not required.

The record supports the administrative law judge's decision that the claim was not timely controverted. The record clearly shows that the employer had knowledge of the accident on February 15, 1975. Section 14(d) states that an employer must controvert a claim within 14 days after he has knowledge of the injury. 33 U.S.C. §914(d). The notice of controversion was not filed until March 19, 1975. As the employer-carrier failed to give timely notice of controversion and there is no evidence indicating that the failure to make timely payments was beyond their control, the imposition of the ten percent penalty is mandatory. *McCabe v. Ball Builders*, 1 BRBS 290, BRB 74-181 (Jan. 31, 1975). Further, the Board rejects employer's argument that the 14(e) penalty should be assessed only for the period prior to the commencement of the compensation payments pursuant to a voluntary agreement under the Florida workmen's compensation law. The 14(e) penalty is to be applied to the difference between the payments due under the Act and payments made under the state workmen's compensation law and computed from the time the first payment was due on

the fourteenth day after the accident, until the time the employer began making payments directly under the Act. *Barton v. Kaiser Steel Corp.*, 2 BRBS 210, BRB No. 75-116 (Aug. 28, 1975).

As for the credit employer is to receive for benefits previously paid under the Act, the administrative law judge properly treated the compensation paid pursuant to the voluntary compensation agreement as advance payments on the federal liability under Section 14(k) of the Act. 33 U.S.C. §914(k); *Flying Tiger Lines v. Landy*, 250 F. Supp. 282 (N.D. Cal. 1965). However, the employer is not entitled to credit for salary paid claimant from the date of the accident to March 15, 1975. As there is no indication in the record that the continuation of claimant's salary by the employer was intended as "advance payments of compensation", no credit for these payments shall be given under Section 14(k) of the Act. *Luker v. Ingalls Shipbuilding*, 3 BRBS 321, BRB No. 75-243 (March 19, 1976).

The Board does not find that the attorney's fee awarded was excessive. The employer has not met its burden of demonstrating that the award of the attorney's fee was not in accordance with law or was arbitrary, capricious, or an abuse of discretion. *See Offshore Food Services v. Murillo, supra.*

In addition, the sum awarded claimant's attorney for the costs of transcripts was indeed reasonable and properly awarded. The Board in *Bradshaw v. J. A. McCarthy, Inc.*, 3 BRBS 195, BRB No. 75-209 (Jan. 26, 1976), held that in a successful prosecution of a claim, reasonable and necessary miscellaneous costs may be awarded to a claimant. This would include a transcript

of the proceeding necessary for the proper presentation of a claimant's post-hearing brief. The claimant's attorney reimbursed the company attorney for the cost of these transcripts so that these were real costs incurred by the claimant in successful prosecution of his claim.

The claimant's attorney has requested approval of a fee for services rendered in successful defense of this appeal. Having submitted to the Board a statement of the extent and character of the necessary legal services rendered, in accordance with the applicable Rules and Regulations, 20 C.F.R. §§702.132, 802.203, the claimant's attorney is awarded a fee of $2,500 to be paid directly by the employer in a lump sum. 33 U.S.C. §928.

The Decision and Order of the administrative law judge is affirmed.

/s/ RUTH V. WASHINGTON
Ruth V. Washington,
Chairperson

We Concur:

/s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

/s/ JULIUS MILLER
Julius Miller,
Member

Dated this 17th day
of May 1976

The attached DECISION sent to the following parties:

Neil C. Taylor, Esq. -Certified-
Barnett Bank Building
Jacksonville, Florida 32202

Slater and Randle, P.A. -Certified-
American Heritage Life Bldg.
Suite 1604
Jacksonville, Florida 32202

Edward A. White, Esq. -Certified-
902 Barnett Bank Building
Jacksonville, Florida 32202

Miss Laurie M. Streeter
Associate Solicitor
U. S. Department of Labor
Suite N-2716, New Labor Bldg.
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Mr. Herbert Doyle
Director, Office of Workers'
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Washington, D. C. 20210

Mr. Walter J. Sullivan
Administrative Law Judge
U. S. Department of Labor
Suite 700, Vanguard Bldg.
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Washington, D. C. 20036

Robert H. Bergeron
US DOL/ESA/OWCP
400 West Bay Street, P.O. Box 35409
Jacksonville, Florida 32202

SUPPLEMENTAL DECISION AND ORDER

U.S. Department of Labor (SEAL)
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of
RUDOLPH McINTOSH
Claimant

and Case No. 75-LHCA-526
OWCP No. 6-22071

PARKHILL-GOODLOE COMPANY, INC.
Employer

and

THE HOME INSURANCE COMPANY
Carrier

Preface

All documents referred to hereinafter are attached hereto and made a part of the record.

All underscoring [italics] has been added by the writer.

In the Decision and Order issued September 8, 1975, it was found that Claimant was entitled to an award for attorneys' fees subject to receipt of a proper applica-

tion. Such application, dated September 19, 1975, has been received as have Respondents' objection thereto, dated September 24, 1975, and a letter of reply from claimant's counsel dated September 25, 1975.

Claimant, who represented himself at the hearing on July 15, 1975, retained counsel on July 29, 1975. Post-trial briefs were due, postmarked August 18, 1975. Claimant's brief was timely filed. Counsel's application reflects that 44.5 hours were devoted to this matter. (The Time Record attached thereto appears to total 45 hours). A fee of $3,120.00 is requested computed at §60.00 per hour for 29.4 weekday hours and at $90.00 per hour for 15 weekend hours.

Respondents question the number of hours claimed, the separate billing for weekend hours and the hourly rates.

After careful consideration, I find that 44.5 hours represents a reasonable expenditure of time on this matter and that $60.00 per hour is a reasonable weekday rate. Despite the fact that time may have appeared to be of the essence counsel could have avoided premium weekend rates by the simple expedient of a request for more time to file his brief. Though I commend counsel's devotion to his task, it is unreasonable to charge Respondents with premium rates. I find an attorneys' fee of $2,670.00 to be reasonable.

Claimant's counsel also seeks an assessment for out of pocket expense as follows:

Copy of transcript:	$215.00
Copies of witness statements admitted into evidence:	$248.69
Photocopies:	$ 27.45

Since relatively prompt review of the record was essential in this case, I find the costs incurred for transcript and witnesses statements to have been necessary and reasonable and assessable in the total amount of $463.69. The request for photocopying expense is vague and undocumented and is disallowed.

In addition to the foregoing, Respondents filed a Petition, dated September 25, 1975, which I construe to be a request for review pursuant to Section 22 of the Act, 33 U.S.C. §922. It seeks amendment, correction and reconsideration of the Decision and Order in several respects now to be considered.

1. Respondents seek reconsideration of the finding that Claimant was not a member of a crew and the finding that Claimant is permanently, totally disabled. The arguments proferred are a repetition of those advanced in the post-trial brief. They are not persuasive and are rejected.

2. Respondents seek amendment to the Order to provide that they be credited for *medical* expense already paid. Certainly the Order intended only payments of outstanding medical expenses but it will be amended hereinafter for the sake of clarity.

3. Respondents seek amendment of the Order to provide that they be credited for *compensation* payments made under Florida law pursuant to the Voluntary Compensation Agreement dated April 9, 1975, (EX. 73). Clearly, they are entitled to such credit. This issue arises because the writer was left with the impression that, although the Carrier had paid the medical expenses, all other post-injury payments to Claimant were wages paid him by his beneficent employer. To clarify the matter I ordered counsel to file a listing of *compensation* payments made which has been filed and is now of record. It reflects payments of *compensation* to Claimant, through October 1, 1975, in the total amount of $8,828.64. The initial Order will be hereinafter amended to provide for proper crediting.

4. Finally, Respondents seek revocation of the assessments of penalties and interest on the ground that controversion was timely. In order to enlarge the record on this issue counsel were also ordered to file the Form BEC-202 which they docketed with the Commissioner. It has been received and is now of record. Respondents memorandum on this issue advances the contention that the Notice of Controversion, having been filed 7 days after they received *notice from the Commissioner that a claim had been filed*, was timely. They confuse *notice of claim* and *knowledge of injury*.

Section 14(d) of the Act, 33 U.S.C. §914(d) is unequivocal and requires that controversion be filed within 14 days after the Employer has "*knowledge of the . . . injury.*" The Form BEC-202 evidences that fact that Respondents had *knowledge of the injury* on February 12, 1975. The controversion filed March 19,

1975, was obviously untimely and imposition of a penalty and interest is mandatory.

Respondents contention that they were not aware that compensation would be sought under the Act until they received the notice of claim from the Commissioner rings hollow in light of the statement in Section 6A of Form BEC-202 that the accident was being reported under the Longshoremens' and Harbor Workers' Compensation Act.

The actual computation of interest and penalties will be left to the Commissioner since interest and penalties should be applied only if the amounts due hereunder exceed the amounts already paid. I cannot make an accurate computation on the record before me.

ORDER

The original Order herein, dated September 9, 1975, is hereby revoked in full and the following substituted therefor:

1. Respondents shall pay Claimant, commencing February 12, 1975, compensation for permanent total disability at the rate of $242.00 per week.

2. The accrued portion of this award, commencing February 12, 1975 through the date of this Supplemental Decision and Order, shall be paid in a lump sum. Respondents are first to be credited with any amounts already paid Claimant pursuant to the Florida compensation statutes. On that amount by

which the total compensation due under this award exceeds the total compensation already paid, interest of 6% per annum and an additional penalty of 10% are due and payable.

3. Respondents shall pay, or reimburse Claimant for, all reasonable expenses for medical, surgical and rehabilitative care and treatment which may be presently outstanding and unpaid and all such future expenses that may be incurred by reason of Claimant's injury.

4. Respondents shall pay directly to Edward A. White, Esq. the sum of $2,670.00 for legal services and the additional sum of $463.69 as costs, for a total of $3,133.69.

/s/ WALTER J. SULLIVAN
WALTER J. SULLIVAN
Administrative Law Judge

Dated: October 29, 1975
Washington, D.C.

CERTIFICATE OF FILING AND SERVICE

I certify that on November 5, 1975 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Sixth Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. Rudolph McIntosh, 7608 Hare Avenue, Jacksonville, Florida 32211 Claimant

Mr. Edward A. White, Attorney at Law, 902 Barnett Bank Building, Jacksonville, Florida 32202

The Home Insurance Company, P. O. Box 16825, Jacksonville, Florida 32216 Insurance Carrier or Employer (if self-insured)
Slater and Randle, Attorneys at Law, Suite 1604, American Heritage Life Building, Jacksonville, Florida 32202

Parkhill-Goodloe Company, Inc., Post Office Box 8707, Jacksonville, Florida 32211

Mr. Neil C. Taylor, Attorney at Law, Barnett Bank Building, Jacksonville, Florida 32202

Mr. John S. Pyatt, Frank B. Hall and Company of Florida, Gulf Life Tower, Jacksonville, Florida 32207

A copy was also mailed by regular mail to the following:

Judge *W. Sullivan*, Office of Administrative Law Judges, U. S. Department of Labor, Washington, D.C. 20210

Office of the Solicitor, U. S. Dept. of Labor, Division of Employee Benefits, Rm. 4221, Main Labor Bldg. Wash. D.C. 20210

Director, Office of Workmen's Compensation Programs, (LS/HW) U. S. Department of Labor, Washington, D.C. 20211

/s/ [ILLEGIBLE]
Deputy Commissioner
Sixth Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS
ADMINISTRATION
Office of Workmen's
Compensation Programs

DECISION AND ORDER

U.S. Department of Labor (SEAL)
Office of Administrative Law Judges
Washington, D.C. 20210

In the Matter of

RUDOLPH McINTOSH
Claimant

and Case No. 75-LHCA-526
OWCP No. 6-22071
PARKHILL-GOODLOE COMPANY, INC.
Employer

and

THE HOME INSURANCE COMPANY
Carrier

Edward A. White
902 Barnett Bank Building
Jacksonville, Florida 32202
For the Claimant

Neil C. Taylor
Barnett Bank Building
Jacksonville, Florida 32202
For the Employer

Slater and Randle
Suite 1604
American Heritage Life Building
Jacksonville, Florida 32202
For the Carrier

Before: WALTER J. SULLIVAN
Administrative Law Judge

This proceeding involves a claim arising under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. §901 *et seq.*, (hereinafter "Act"), and the Rules and Regulations implementing the Act, 20 C.F.R. Parts 701 and 702.

A hearing was held before me at Jacksonville, Florida on July 15, and July 16, 1975. The Claimant represented himself at the hearing but counsel has since appeared in his behalf. The Employer and Carrier were represented by counsel. All parties were afforded full opportunity to be heard, adduce evidence, call, ex-

amine and cross-examine witnesses, make oral argument and file briefs.

Briefs have been received from the parties as has Claimant's "Motion To Dismiss For Failure To Timely Controvert", dated August 26, 1975, with the notice of controversion, dated March 19, 1975, attached; all of which are included in the record and have been duly considered.

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following Preliminary Ruling, Findings of Fact, Conclusions of Law and enter the following Order.

PRELIMINARY RULING

As stated above, the Claimant has moved to dismiss this action for Respondents' failure to timely controvert pursuant to Section 14(d) of the Act, 33 U.S.C. §914(d). Contrary to the assertion of Respondents' counsel that "the controversion was timely", (TR. 51), it is now apparent on the record that it was not. The Motion to Dismiss, however, must be denied. Failure to controvert in timely fashion does not bar an Employer from later contesting the claim on its merits. The penalty provided by Section 14(e) of the Act, 33 U.S.C. §914(e), provides the appropriate sanction in such circumstances. *SHELTON* v. *PACIFIC ARCHITECTS AND ENGINEERS, INC.*, 1 BRBS 306, (January 31, 1975). Motion denied.

FINDINGS OF FACT

By permit No. SASKS AS (6020), dated January 11, 1971, and extensions thereof, the Secretary of the Army authorized Georgia Power Company "to perform channel improvements by removal of snags and debris" in the Altamaha River including that portion known as Tom's Creek cutoff. (Ex. EC-43).

In the context of this case a "snag" is, as defined in Webster's Third New International Dictionary, "a tree or a branch, log or stump embedded in a . . . stream bed in such a manner that projecting parts constitute a hazard to navigation." "Snagging", as the word implies, is the removal of snags.

Georgia Power contracted with the Hardaway Company for the permitted channel improvements which were designed to facilitate shipment of a reactor pressure vessel, by barge, via the Altamaha and Tom's Creek cutoff, to its nuclear power plant near Baxley, Georgia.

The Hardaway Company subcontracted "the necessary snagging in the cutoff" to Parkhill-Goodloe Co., Inc., the Claimant's employer. (EX. EC-69). The Claimant, Rudolph McIntosh, was assigned to supervise the snagging operation. Actual snagging was commenced in the cutoff on February 1, 1975.

The snagging procedure, in general, was that the tug "Little Ed", piloted by Eddie Rhodes, (a/k/a Eddie Williams), would maneuver the motorless Work Barge JHC-275 into positions which enabled deckhands

William Gale and Stephen Hand to attach a sling to a snag and then attach the sling to the cable of the Link Belt crane which was mounted on the barge and operated by James Shelton. The crane would hoist the snag onto the barge for later transport to a spoil area. Because Tom's Creek cutoff had flooded its banks and the current was swift it was frequently necessary to use a skiff, powered by twin outboards, in order to reach a snag and attach the sling.

The skiff was also used to transport the men to and from Jesup where they were lodged, the tug and barge being anchored at night in the cutoff. Except for coffee and lunch, warmed on a Coleman stove on the tug, the men ate their meals ashore. They worked an 8 hour day, wore hard hats and work clothes and, except for Claimant, were paid by the hour. He was paid on a weekly basis and was provided with a pickup truck.

In the course of the snagging operations on February 12, 1975, the tug pushed the barge partially aground and against a large oak tree rooted in the flooded bank. The tug, underpower, was nosed against the barge to neutralize the current. Claimant, seated on logs stacked on the deck of the barge, was directing the men and equipment in the uprooting of the tree, a task which proved unduly difficult because of the weight of the tree. When a limb of the tree swung toward the Claimant, he sought to escape; but slipped and fell forward on the deck. The limb struck and dislodged the stack of logs, one of which rolled onto Claimant's back inflicting severe crushing injuries to his back and chest.

The only evidence on the extent of injury came from the Claimant and his wife. There is no question, however, that Claimant is paraplegic and will be confined to a wheelchair, as he was at the hearing, for the remainder of his life. He is 48 years of age, attained a 9th grade education and his sole occupation has been dredging work. His average weekly wage for the year immediately preceding injury was $363.00. (Ex. EC-68).

CONCLUSIONS OF LAW

NOTE: The underscoring [italics] appearing hereinafter have been added by the writer for emphasis.

It is not disputed that Claimant was an employee of a maritime employer and suffered accidental injury, arising out of and in the course of his employment, while upon a barge on navigable waters of the United States on February 12, 1975, and that he filed a timely notice of injury and a timely claim. Nor is there any doubt that the barge was a "vessel" within the meaning of the Act. *NORTON v. WARNER*, 321 U.S. 565, 64 S. Ct. 747 (1944).

The sole issue presented is whether the Claimant, on the date of injury, was "a member of a crew" so as to be excluded from coverage under the Act. 33 U.S.C. §§902(3); 903(a)(1).

Observing that this issue has much troubled the courts, Judge Bell stated in *BROWN v. ITT RAYONIER, INC.*, 497 F.2d. 234 (5th Cir. 1974) that: "Neither 'seaman' in the Jones Act nor 'member of a

crew' in the LHWCA is defined by those statutes and judicial efforts to fashion a definition have not produced a bright clear line of demarcation. Indeed, the myriad circumstances in which men go upon the water confront courts not with discrete classes of maritime employees; but rather with a spectrum ranging from the blue-water seaman to the land-based longshoreman. Nonetheless the statute demands that the line be drawn . . . ."

In drawing that line in this case all factual doubts must be resolved in favor of the Claimant, *WHEATLEY* v. *ADLER*, 407 F.2d 307, (D.C. Cir. 1968); the Act must be construed liberally in his favor, *VORIS* v. *EIKEL*, 345 U.S. 328, 74 S. Ct. 88, (1953) and there is a presumption of compensability afforded him by Section 20 of the Act, 33 U.S.C. §920.

Respondents contend that, in drawing such line, Claimant's status is to be determined on the basis of his *overall* relationship to the *entire* snagging operation and his *overall* relationship to *all three vessels*, i.e. the tug, barge and skiff, which they argue constitute a single vessel.

The issue is far more narrow. It is, simply stated, whether, *on the day of injury*, Claimant was aboard the barge primarily to aid in her navigation.

In *LONG ISLAND R. CO.* v. *LOWE*, 145 F.2d. 516 (2nd Cir. 1944) the issue of overall employment as determinative of status was considered and the court stated, in pertinent part: "The appellants . . . urge that the character of the employment cannot be properly determined unless his work during the entire period of his employment be taken into consideration, and it was on this basis that the Deputy Commissioner reached his conclusion . . . In this we think error in a matter of law was committed. The employee's *duties on the day of the accident* are the critical facts which should determine his status. . . . We can perceive no reason in the words or purpose of the Act for lumping an employee's activities over the period of his employment and classifying him according to the greater number of days he was either seaman or longshoreman."

In *DIOMEDE* v. *LOWE*, 87 F.2d 296 (2nd Cir. 1937), Cert. Den. 301 U.S. 682, 57 S. Ct. 783, it was argued that a tug with several scows in tow constituted "a vessel". The court held: "Assuming that the flotilla were to be regarded as 'a vessel' within the meaning of the excepting clause, *nevertheless* the question whether the decedent was a member of the crew must be determined *solely* from the nature of the decedent's employment with relation to the scow upon which he worked."

These cases make it clear that the function Claimant was performing on the barge on the day he was injured is determinative of his status and function connotes his primary duties. *SOUTH CHICAGO COAL & DOCK CO.* v. *BASSETT*, 309 U.S. 251, 60 S. Ct. 544 (1940); *BEDDO* v. *SMOOT SAND & GRAVEL CORP.*, 128 F.2d 608 (C.C.A. D.C. 1942). The fact that he may have been performing ancillary acts of seamanship, which were incidental and minimal in relation to his primary duties, does not serve to make him a member of the crew. *TRAVELERS INSURANCE CO.* v. *BELAIR*, 290 F. Supp. 221 (D.C. Mass. 1968);

BELLOMY v. *UNION CONCRETE PIPE CO.*, 297 F. Supp. 261 (D.C. W. Va. 1969).

Based upon the evidence before me, I conclude:

1. that Claimant, when injured, was primarily engaged in an activity normally associated with heavy construction work, i.e. the uprooting, by crane, of a large tree;

2. that the barge was *in situ* throughout the uprooting operation, was being used only as a work platform and was not in navigation; and

3. that any intermittent hand signals to the pilot of the tug to back off so as to increase the leverage on the tree were incidental to the primary task at hand.

It is interesting to note here that in the contract under which this work was being performed, (EX EC-69), the parties agreed to abide by the Occupational Safety and Health Act of 1970, an Act which excluded seamen from its coverage since they are subject to Coast Guard jurisdiction over their health and welfare. 29 U.S.C. §653(b)(1).

In light of the conclusions reached, I find that Claimant, when injured, was *not* a member of a crew so as to be excluded from coverage under the Act. To the contrary, I find that he was engaged in maritime employment upon navigable waters of the United States and thus covered by the Act. *ANDERSEN* v. *OLYMPIAN DREDGING CO.*, 57 F. Supp. 827 (D.C. Cal. 1945); *McKIE v. DIAMOND MARINE CO.*, 204 F.2d 132 (5th Cir. 1953).

I find further that Claimant is permanently, totally disabled and entitled to benefits accordingly.

It appearing of record that the controversion was not timely filed the 10% penalty provided by Section 14(e) of the Act, 33 U.S.C. §914(e), must be assessed. *CARAMAGNA* v. *CAMPBELL MACHINE, INC.*, 1 BRBS 446 (May 2, 1975).

Finally, Claimant is entitled to an additional award of a reasonable attorney's fee for the legal services performed on his behalf. Upon receipt of a fee application from counsel is conformity with 20 C.F.R. §702.132 that award will be determined.

ORDER

1. Respondents shall pay Claimant, commencing February 12, 1975, compensation for permanent total disability at the rate of $242.00 per week until otherwise ordered. The accrued portion of this award, commencing February 12, 1975, through the date of this decision, shall be paid in a lump sum together with interest at the rate of 6% per annum and an additional amount equal to 10% of each installment, both computed from the date each payment was originally due.

2. Respondents shall pay for the reasonable cost of all medical, surgical and rehabitative care and treatment necessitated by Claimant's injury.

/s/ WALTER J. SULLIVAN
WALTER J. SULLIVAN
Administrative Law Judge

Dated: 9/8/75
Washington, D.C.

CERTIFICATE OF FILING AND SERVICE

I certify that on September 12, 1975 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Sixth Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. Rudolph McIntosh, 7608 Hare Avenue, Jacksonville, Florida 32211 Claimant

Mr. Edward A. White, Attorney at Law, 902 Barnett Bank Building, Jacksonville, Florida 32202

The Home Insurance Company, P. O. Box 16825, Jacksonville, Florida 32216 Insurance Carrier or Employer (if self-insured)
Slater and Randle, Attorneys at Law, Suite 1604, American Heritage Life Building, Jacksonville, Florida 32202

Parkhill-Goodloe Company, Inc., P. O. Box 8707, Jacksonville, Florida 32211

Mr. Neil C. Taylor, Attorney at Law, Barnett Bank Building, Jacksonville, Florida 32202

Mr. John S. Pyatt, Frank B. Hall and Company of Florida, Gulf Life Tower, Jacksonville, Florida 32207

A copy was also mailed by regular mail to the following:

Judge *W. Sullivan*, Office of Administrative Law Judges, U. S. Department of Labor, Washington, D.C. 20210

Office of the Solicitor, U. S. Dept. of Labor, Division of Employee Benefits, Rm. 4221, Main Labor Bldg. Wash. D.C. 20210

Director, Office of Workmen's Compensation Programs, (LS/HW) U. S. Department of Labor, Washington, D.C. 20211

/s/ R. H. BERGENY
Deputy Commissioner
Sixth Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workmen's Compensation Programs

PETITION FOR EXTENSION OF TIME FOR FILING PETITION FOR WRIT OF CERTIORARI

In the Supreme Court of the United States

PARKHILL-GOODLOE COMPANY, INC. and THE HOME INSURANCE COMPANY,
Petitioners,

vs. Case No. #

RUDOLPH McINTOSH (Claimant), DIRECTORS OF THE OFFICE OF WORKERS COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, U.S. DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD, and U.S. DEPARTMENT OF LABOR, ESA-OWCP,
Respondents.

Come now the Petitioners, PARKHILL-GOODLOE COMPANY, INC., and THE HOME INSURANCE COMPANY, by and through their undersigned attorneys, and respectfully request an extension of time in accord with Rules of Supreme Court 22(1) and U.S.C.A. Title 28, Section 2101(c), for an additional sixty days to file the Petition for Writ of Certiorari, and show unto the Court:

1. That due to the heavy work-load of counsel, we are unable to file a Petition for Writ of Certiorari within the ninety-day period, as set forth in Supreme Court Rule 22(1) and U.S.C.A. Title 28, Section 2101(c), and that this is due to the heavy work load and large

number of cases to be tried by this small law firm in the State Circuit Courts, and appeals pending in which Briefs must be written in the State District Court of Appeal and no further extension of time can be granted therein.

2. That justice would be served by an extension of time for the filing of said Petition for Writ of Certiorari.

SLATER & RANDLE, P.A.

/s/ RICHARD L. RANDLE
Richard L. Randle, Esq.
1604 American Heritage Life Bldg.
Jacksonville, Florida 32202
(904) 354-2401 and 355-9565

Attorneys for Petitioners

I DO CERTIFY that copies of the foregoing PETITION FOR EXTENSION OF TIME FOR FILING PETITION FOR WRIT OF CERTIORARI have been furnished to:

Edward A. White, Esq.
902 Barnett Bank Building
Jacksonville, Florida 32202
Attorney for Rudolph McIntosh

Neil C. Taylor, Esq.
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Jacksonville, Florida 32202

Benefits Review Board
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Washington, D. C. 20036

Miss Laurie M. Streeter
Associate Solicitor
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Suite N-2716, New Labor Bldg.
Washington, D. C. 20210

Mr. Herbert Doyle
Director, Office of Workers' Compensation Programs
U. S. Department of Labor
Suite S-3524, New Labor Bldg.
Washington, D. C. 20210

Hon. Walter J. Sullivan
Administrative Law Judge
U. S. Department of Labor
Suite 700, Vanguard Bldg.
1111 - 20th Street, N.W.
Washington, D. C. 20036

Mr. Robert H. Bergeron
US DOL/ESA/OWCP
400 West Bay Street
P. O. Box 35409
Jacksonville, Florida 32202

by United States mail, and sufficient postage affixed thereto for delivery, this 27th day of July, A. D. 1977.

/s/ RICHARD L. RANDLE
Attorney

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States

PARKHILL-GOODLOE COMPANY, INC., ET AL.,
Petitioner,

versus No. A-101

RUDOLPH McINTOSH, ET AL.

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 28, 1977.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme Court of the United States

Dated this 29th
day of July, 1977.

FACTS AND EXCERPTS FROM THE TESTIMONY

Q. And you did direct the men and command the men at Tom's Creek.
Is that correct?
A. That's correct.
Q. *And you directed the movements of this barge and the skiff and the tug, did you not, sir?*
A. I did.
Q. *And you were in command of the tug, the barge, and the skiff, were you not, at Tom's Creek?*
A. Yeah."
(T. 65, 66 — McIntosh). (Emphasis Supplied)

There is no contradiction that Captain McIntosh was in charge of his crew (tug captain-boatman and deckhands) (T. 205), *and directed, commanded and navigated all of the vessels every day from the time of his arrival* in the Altamaha River approximately twenty-five to thirty-five miles downstream to the day of and *including, their movement (which was constant) until and at the moment of the accident.* (T. 35, 37, 48, 49, 65, 66, 71, 72, 79, 82, 83, 84, 90, 93, 94, 97, 123, 193, 194, 218, 223, 239, 249, 250; A.L.J. No. A Shelton 41, A.L.J. No. A Gale 78, A.L.J. No. B Hand 22, 31, 44).

"Q. And on the journey — the voyage — from the place where you joined the barge and the tug and the skiff, up to the Tom's Creek Cutoff you were in command of the barge and the skiff and the tug, *and in command*

of the people who were on the tug and the barge and the skiff, were you not, sir?
A. I was."
(T. 71 — McIntosh) (Emphasis Supplied)

"Q. Now, when you joined the barge — whether it 25 or 35 miles from the landing, or the Tom's Creek — was that barge pushed that 25 or 35 miles up the Altamaha River there by the tugboat, the Little Ed?
A. Yes.
Q. And was that pushed by the — and was — this was the deck crew that was on it at the time?
A. The *boatman runs the boat.*
We got a boatman that runs the boat. You tell the man to. 'Let's go,' and we're going up where he's going and he — and he does. *We got deck hands on there to tie his lines,* and —
Q. And what else do the deck hands do?
A. Anything you ask them to do.
Q. All right.
And these deck hands would tie lines, and this boatman who directs — or, who actually physically runs the tugboat — *they take their commands from you* — is that correct — *and they are part of the deck crew?* Is that correct, sir?
A. That's right."
(T. 82, 83 — McIntosh). (Emphasis Supplied)

"Q. And your duties were what when you were on the tug?

A. *Deckhand*, tightening the lines." A.L.J. A Gale 69 (Emphasis Supplied)

"Q. When you all would tie up at night, who would *direct the tying up operations?*
A. *Mr. McIntosh.*
Q. *Was that both the tug and the barge?*
A. *Yes, sir. . . .*" A.L.J. A Gale 72. (Emphasis Supplied)

"Q. Okay.
Now, when you said, 'Let's go,' that's a command, isn't it?
A. Well, I would say so.
Q. And, you stayed *in command of that entire crew, and all of the vessels, up until the time of the accident.*
Is that correct, sir?
A. Yes.
Q. And you directed the operations which were being done on Tom's Creek, the snagging operations?
A. That's right.
Q. *You directed and told these men what to do, — and where to move the vessels, and what to do, and so forth, during the entire project.*
Is that correct?
A. I did."
(T. 83, 84 — McIntosh) (Emphasis Supplied)

"Q. *Was he in overall charge of the tug?*
A. *He was in overall charge of it all, tug and all.*

Q. What other duties did he perform while you all were in route moving the barge, other than directing the tug?
A. That was all." A.L.J. A Shelton 41-42 (Emphasis Supplied)

Captain McIntosh *navigated the barge in its many many moves* each day on the water *by the use of the tug from the deck of the barge,* (T. 90, 97).

"Q. Well, were the operations there conducted from the barge.
A. That is right.
Q. You were on the barge.
Is that correct?
A. That's right.
Q. Is that where you were, directing the operations on the barge, sir?
A. That's right.
Q. And on the date that this accident happened, and at the time of this accident, were you on the barge directing the operations?
A. I was."
(T. 90 — McIntosh),

"Q. And what did he do when he was on the barge on the way up?
A. *Made sure that we went the right way, that we kept everything cleaned, straightened up.*
Q. *In other words, he was in charge of both the tug and the barge?*
A. *Yes, sir.*
Q. *Did he give any signals as to directions for the tug to take?*
A. *Yes, sir.*" A.L.J. A Gale 71. (Emphasis Supplied)

"Q. *Would he direct the activities of the tug?*
A. *Yes, sir.*
Q. *Did he direct the activities of the barge, too?*
A. *Yes, sir.*
Q. *Did he give signals to the tug as to which way to go and which way to pull the barge and where to locate them?*
A. *Yes, sir.*" A.L.J. A Gale 78 (Emphasis Supplied)

"Q. Did Mr. McIntosh remain in charge of the barge and the tugboat and the small boat and the entire operation during the entire time he was up there?
A. Yes, sir.
Q. Did he *direct* the activities of the tugboat and *the barge* —
A. *Yes, sir.*
Q. *— during the entire time he was there?*
A. *Yes, sir.*" A.L.J. A Gale 86. (Emphasis Supplied)

"Q. *Was he also directing the operation of the tug at the time of the accident?*
A. *Yes, sir.*
Q. And how did he do that?
A. Well, where he was sitting over on the log, he could see Eddie on the tug, because there was a pile of limbs back there, and Eddie couldn't see over them to see if he was on the deck.
Q. What kind of signals would he give to Eddie?
A. *He would give him hand signals to hold or ease ahead or back up.*" A.L.J. A Gale 87. (Emphasis Supplied)

All of these members of the crew of the vessels participated in this operation under the command of Captain McIntosh while on a vessel in the navigable water of the Altamaha River *while said vessels were being navigated constantly* (T. 249, 250) because of the snagging operation being performed and *due to the strong swift current*

"Q. Was there a swift current in Tom's Creek?
A. There always is when it's high water, or low water, as far that's concerned.
It's worse at high than it is at low."
(T. 92 — McIntosh)

of the Altamaha River at the Tom's Creek Cut at this time requiring constant navigation to get the barge in and out of position, move it, hold it, and remove it (barge) by use of the tug. (T. 250, 251). The prime example of the fact that it required *constant navigation by Captain McIntosh* is that not only did he have to get the barge in position

"JUDGE SULLIVAN: Mr. Garrard, during the two weeks that you worked in company with Mr. McIntosh, was it the *ordinary procedure to position the barge by using the tug's motor power?*

THE WITNESS: Yes, sir."
(T. 248, 249 — McIntosh) (Emphasis Supplied)

"Q. *You had a strong current at the time of this accident?*
A. *Yes, sir.*" A.L.J. A Shelton 62. (Emphasis Supplied)

"Q. *Well, at the time of this accident, were you against the current or with the current?*
A. *We were against it.*" A.L.J. A Gale 91. (Emphasis Supplied)

on the water, *but due to the swiftness of the current* (T. 92, 212, and the operation, *the tug had to keep constantly pushing or pulling the barge*

"Q. And what did this tug do, as far as the barge was concerned, with its crane on it?
A. Well, it used this tug to hold it in position while we were removing snags, either in the river or on the edge of the river."

under the command of Captain McIntosh. (T. 249).

"JUDGE SULLIVAN: Ordinarily, how long would the barge remain in one position?
Was there any rule of thumb that you can give me on that?

THE WITNESS: No, sir, just according to how difficult and how thick the snags were in that particular area.

JUDGE SULLIVAN: It wasn't a matter of putting it in one position and leaving it there for say, a day, and it was always accompaned by the tug wherever it went?

THE WITNESS: That's right.

MR. RANDLE: Your Honor, he's moving his head, and I don't know if the Reporter got that or not.
I don't think she did; she's motioning her head that she didn't get that.

JUDGE SULLIVAN: He said, 'Yes, Your Honor,' if he wasn't heard.
So, *it was a matter of continuously maeuvering this barge by use of the tug* to positions where it could extract these snags or trees or whatever.
Is that correct?

THE WITNESS: *That's correct.*"

There is no question that the entire operation was on water (T. 193)

"Q. And this operation was on water wasn't it, sir?
A. *The actual snagging* of Tom's Creek was in water. *It was on the water.*" (T. 123) (Emphasis Supplied)
Q. All right.
And who would tell them when to move the barge and when to move the tug and when to move the boat?
A. *Mr. McIntosh.*
Q. All right, sir.
Was he, in your opinion, in complete and absolute charge of the barge and of the tug and of the skiff?
A. Yes, sir.
Q. Was this entire operation — was it conducted from land, or was it conducted from water?
A. *Water.*"
(T. 192, 193) (Emphasis Supplied)

Exhibits, aerial photographs (Exhibit No. 11), water level photographs (Exhibits 29), taken a few days

before the accident showing the skiff, the barge and the tug, said pictures clearly showing Captain McIntosh, witness Garrard, the deck hands, and the boatman, unmistakably depicting the *swift and strong current* of the Altamaha River at or near where Captain McIntosh was injured demonstrate need for constant navigation of the vessels by Captain McIntosh, even when they were not being moved from position to position, which was as described by the witnesses, as *constant*. The equipment list showing the vessels used (Exhibit 71), their size, tonnage, etc., payscale schedules (Exhibit No. 68), (T. 302) showing the payscale for Captain McIntosh as a *deck Captain*,

"Q. Well, you got paid $389 a week, which is a deck captain's pay, is it not?
A. Un-huh; that's right."
(T. 123).

"Q. Now, Mr. McIntosh, during the last ten years, while you've been *employed by Parkhill-Goodloe, at least 80 percent* of your time has been *spent on a dredge*. Is that correct, sir?
A. I would say it's correct.
Q. And that would be *at least for the last three years* in the *capacity of a deck captain* — or the last five years, you say?
A. Yes.
Q. In all your dredging operations did you generally *have barges along*?
A. *Yes*.
Q. *And how are those barges propelled*?
A. *Tugboat*."
(T. 81 — McIntosh) (Emphasis Supplied)

Captain McIntosh had a Boatman's license from the U.S. Coast Guard (T. 32, 33).

"Q. *Now, did Mr. McIntosh use these particular markings in aid of navigation in spotting his channel*?
A. *That's right.*" (T. 237)

"Q. What did you see Mr. McIntosh doing as far as aiding navigation, in the use of these markers?
A. *The only thing I would — when I observed Mr. McIntosh he was, of course, giving hand signals to the tugboat operator.*
Q. *As to what to do*?
A. *That's right.*

JUDGE SULLIVAN: Just tell us what you observed, without benefit of an opinion.

THE WITNESS: Okay.
Like I said, all I observed was him *giving hand signals to the tugboat* operator.

BY MR. RANDLE:
Q. As to where to put the tugboat and where to put the barge and that sort of thing?
A. Well, the time I observed him *he was giving directions because they were going to unload*, and *of course he had to keep them out of the woods*.
Q. And he had to *direct the navigation of the tug and the barge down the river*?
A. *That's right*.
Q. *And the Tom's Creek Cut part of the river*?
A. *That's right*.

Q. *And did he do that the entire time that you were there?*
A. *Yes, sir."*
(T. 238, 239). (Emphasis Supplied)

"BY JUDGE SULLIVAN: *When the tug was moving the barge, either up or down the river, who, from your observation, was doing the navigating?*

THE WITNESS: *Well, it was a mixture of the boatman and of Mr. McIntosh."*
(T. 250, 251). (Emphasis Supplied)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-599

PARKHILL-GOODLOE COMPANY, INC. and
THE HOME INSURANCE COMPANY,
Petitioners,

versus

RUDOLPH McINTOSH (Claimant), DIRECTORS OF THE OFFICE OF WORKERS COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, and U.S. DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD, and U.S. DEPARTMENT OF LABOR, ESA-OWCP,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Rudolph McIntosh, the claimant in this Longshoremen and Harbor Worker's Compensation Act case, opposes the Petition for Writ of Certiorari filed before this Court by petitioners, Parkhill-Goodloe, Inc. and The Home Insurance Company.

CITATIONS TO ORDERS BELOW

The initial decision finding in favor of compensability under the Longshoremen and Harbor

Worker's Compensation Act was rendered on September 8, 1975 by the trier of fact, the Administrative Law Judge, following the evidentiary hearing on the merits, the text of this Decision and Order appears on pages 22a through 33a in the appendix of petitioners' brief. Thereafter, a Supplemental Decision and Order reaffirming compensability was entered by the Administrative Law Judge on petitioners' Petition for Rehearing on October 29, 1975 a copy of which appears on pages 15a through 22a of the appendix to petitioners' brief.

The action was then appealed by petitioners to the Benefits Review Board of the United States Department of Labor which rendered its Decision affirming compensability on May 17, 1976, a copy of which appears on pages 3a through 14a of the appendix to petitioners' brief.

Petitioners then appealed to the United States Fifth Circuit Court of Appeals which entered a Per Curiam affirmance of the holdings below on April 1, 1977. A copy of this decision appears on pages 1a through 2a of the appendix to petitioners' brief. Petitioners thereupon filed a Petition for Rehearing En Banc which was denied by the Fifth Circuit Court of Appeals by its Order entered May 31, 1977 a copy of which appears on pages 2a through 3a of petitioners' brief.

JURISDICTION

Respondent McIntosh challenges the contention of petitioners that this case is a proper matter for review

by a writ of certiorari, and that jurisdiction of this Court is proper under Title 28, United States Code Annotated, Sections 1254(1) and 2101 as well as United States Supreme Court Rule 19. Under Rule 19 of this Court this is not a matter deserving consideration for review by a writ of certiorari. It does not involve a constitutional question, conflict jurisdiction, an important question of federal law, or departure from the accepted and usual course of judicial proceedings. It involves solely the factual findings of the trier of fact, the Administrative Law Judge, in a Longshoremen and Harbor Worker's Act case. Having made that factual determination the Administrative Law Judge applied the law and held the claim compensable. That determination of the particular factual pattern of this case was fully litigated at the trial level, and appealed to the Benefits Review Board, and to the Fifth Circuit Court of Appeals. Respondent McIntosh therefore contends that this case which is presented solely as a challenge to findings of fact by the trier of fact is not a proper matter for review under Rule 19 by a writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the findings of fact by the trier of fact, the Administrative Law Judge, based upon evidence received at the evidentiary hearing which were appealed to and affirmed by the Benefits Review Board and appealed to and reaffirmed by the United States Fifth Circuit Court of Appeals are a proper matter for this Court to review by certiorari?

2. Whether the conclusions of law of the Administrative Law Judge affirmed by the Benefits

Review Board and reaffirmed by the United States Fifth Circuit Court of Appeals are proper subjects for review by this Court by Writ of Certiorari?

CONCISE STATEMENT OF THE CASE

This case is a workmen's compensation claim under the Longshoremen and Harbor Worker's Compensation Act as amended and is appealed to this Court on the findings of fact of the trier of fact. A two day evidentiary hearing was held before the Honorable Walter J. Sullivan, Administrative Law Judge, United States Department of Labor on July 15-16, 1975. The employer and carrier were represented by two experienced trial lawyers, while the claimant attempted to represent himself.

The critical factual issue in the case was whether or not the claimant was the member of a crew of a vessel and therefore excluded from the coverage of the act. The claimant testified and sworn statements of other members of the claimant's work crew were introduced presenting facts supporting the contention of the claimant that he was not the member of a crew of a vessel and rather was the supervisor or foreman of a construction project on Tom's Creek, a branch of the Altamaha River, in the State of Georgia. The employer and carrier through its counsel presented evidence to support their contention that the claimant was the member of a crew of a vessel.

At the close of the evidence both of the attorneys for the employer and carrier made oral closing arguments. The claimant was physically unable to re-

main throughout the entire evidentiary hearing and no closing argument was made for him.

At the conclusion of the hearing Judge Sullivan granted leave to both the claimant and the employer and carrier to submit written post-trial briefs in support of their respective positions and claimant thereupon secured the services of his attorney herein. Counsel for the employer and carrier presented their position on the issues of fact in a 38 page post-trial brief. And in response to the post-trial brief submitted by counsel for claimant the employer and carrier's attorneys submitted a 44 page reply brief. Thereafter Judge Sullivan entered his Decision and Order on September 8, 1975 finding the factual issues in favor of the claimant and adversely to the employer and carrier.

Employer and carrier thereupon filed a Petition for Amendment, Correction, and Reconsideration of the Decision and Order making factual and legal arguments in support of petitioner's position. This petition was rejected by Judge Sullivan and his Supplemental Decision and Order was entered on October 29, 1975.

Petitioners then appealed to the Benefits Review Board of the United States Department of Labor and in support thereof filed a 63 page brief raising the same factual issues and arguments made below. In response to claimant's brief to the Benefits Review Board petitioners filed a 43 page reply brief to the Board further embellishing the same arguments. Oral argument was permitted before the Board and petitioners

orally argued the same evidentiary points, their arguments encompassing 76 pages of the 97 page transcript of the oral argument. The Benefits Review Board after considering petitioners' positions and arguments, found that the record supported the finding that claimant was not a crewmember, affirmed the holding of the Administrative Law Judge, and entered its Decision accordingly on May 17, 1976.

The employer and carrier then filed an appeal with the United States Fifth Circuit Court of Appeals again citing the same factual issues and arguments with a 63 page main brief and a 30 page reply brief. The employer and carrier were also permitted oral argument before the Fifth Circuit Court of Appeals. By its Per Curiam decision entered April 1, 1977 the Court of Appeals affirmed the holdings below. The employer and carrier thereupon filed a Petition for Rehearing En Banc with the Court of Appeals supported by an 11 page brief. By Order entered May 31, 1977 the Court of Appeals denied that petition. The petitioners, now have filed their Petition for a Writ of Certiorari with this Court raising the same factual issues and questions so thoroughly litigated and extensively argued below.

ARGUMENT

1. Whether The Findings Of Fact By The Trier Of Fact, The Administrative Law Judge, Based Upon Evidence Received At The Evidentiary Hearing, Which Were Appealed To And Affirmed By The Benefits Review Board And Appealed To And Reaffirmed By

The United States Fifth Circuit Court Of Appeals Are A Proper Matter For This Court To Review By Certiorari?

From a reading of the petition of writ of certiorari filed by the employer and carrier with this Court it would appear that there was no disputed issue of fact below and that the Administrative Law Judge, Benefits Review Board, and United States Fifth Circuit Court of Appeals to whom were proffered petitioners' arguments and contentions on so many occasions, were totally oblivious to the testimony and evidence presented at the evidentiary hearing. The 11 pages of excerpts of testimony in petitioners' appendix glean from the 423 page record only the testimony favorable to petitioners entirely ignoring the evidence favorable to plaintiff which the trier of fact found convincing. Many of petitioners' factual representations bear no resemblance to the testimony in the record below. For example, throughout petitioners argument, the claimant is referred to as "Captain McIntosh". This misleading appellation was conferred upon the claimant by counsel for petitioners early in these proceedings as if by referring to him as such they can make it so. Not only is the term "Captain McIntosh" inaccurate it is in total and absolute conflict with the uncontradicted testimony of all witnesses. When claimant was interrogated on this issue by Judge Sullivan he testified:

> "Well, as I said, I wasn't a captain. I was sent up there to supervise the job, and if I had been a deck captain, or a captain, I would have been on that barge from the time it left the yard until it got to the Altamaha River . . ." (Tr. 30)

"JUDGE SULLIVAN: On February the 12th of 1975, what was your position with Parkhill-Goodloe?

THE WITNESS: I was job supervisor, Tom's Creek.

JUDGE SULLIVAN: And how long had you had that position prior to February 12th of 1975?

THE WITNESS: Well, about a week. See, I was the kinda man that if they wanted me for a deck captain, they used me for a deck captain. If they wanted me to hold down a captain's place, well, I did that. Then if they had a job such as this, that they need a supervisor to go on and supervise the job, then they usually send me." (Tr. 31)

Likewise each of the members of the work crew in their statements refused to agree with the attempt of carrier's counsel to categorize claimant as "Captain McIntosh". Stephen Hand testified:

"Q. Did you ever call Rudolph McIntosh captain?

A. Not on the job, no sir. . . .

Q. Do you know anything about Mr. McIntosh's title on either the XL or on the barge or tug, the job at Jesup?

A. The job at Jesup, he was just a . . . just a foreman, I reckon. . . .

Q. You just came up with the idea that he is a foreman yourself?

A. Unless he was a foreman or supervisor. He was running the job.

Q. And he was also captain of the whole job; was he not. He was also captain of the barge?

A. Not in my opinion. (Ex. ALJB, St. Hand 22-24)

The crane operator, James Shelton, testified:

Q. Now, who was in charge of the overall project up there?

A. Mr. McIntosh.

Q. What title did he have so far as you knew?

A. As far as I know, he was the job superintendent of that job, supervisor, superintendent.

Q. And who was in charge of the tug?

A. Well, Mr. McIntosh was . . . he was the boss of the whole job, and Eddie Williams he was the . . . well you might call him the tug captain or whatever you want. He was the only one that run the boat, had anything to do with it." (Ex. ALJA, St. Shelton 30-31)

William S. Gale testified as follows:

"Q. Was he in charge of the entire operation?

A. Yes, sir. He was our supervisor, foreman, whichever one you want to call it.

Q. Did you ever call him captain?

A. No, sir.

Q. Have you ever called him captain?

A. No, sir.

Q. Was he a deck captain?
A. No, sir, I don't think he ever was." (Ex. ALJA, St. Gale 78-79)

The erroneous use of the term "Captain McIntosh" by counsel for petitioners' has not benefitted them in the proceedings and appeals below and should not be given persuasive effect here, for what is presented here is a pure and simple challenge to a factual determination by the trier of fact.

This Court has specifically held that the determination of whether or not an employee is a member of a crew is a question of fact and is to be determined by the trier of fact. *South Chicago Coal & Dock Co. v. Bassett*, 309 US 251, 60 S. Ct. 544, 84 L. Ed. 732 (1939). In that case the Court held:

> "So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries was or was not "a member of a crew" turns on questions of fact, the authority to determine such questions has been confided by Congress to the deputy commissioner. *Hence the Court of Appeals correctly ruled that his finding, if there was evidence to support it, was conclusive* and that it was the duty of the District Court to ascertain that it was so supported, and, if so, to give it effect *without attempting a retrial*. (p. 257-258) (Emphasis Supplied)

In the original Decision and Order, Judge Sullivan, the trier of fact, found that Mr. McIntosh was not "a member of a crew". (Petitioners' Appendix page 30a)

In his Supplemental Decision and Order on the "member of a crew" issue, Judge Sullivan found as to employer and carrier's contentions:

> "The arguments proffered are a repetition of those advanced in the post-trial brief. They are not persuasive and are rejected".

In its Decision, the Benefits Review Board, found that "the record supports the Administrative Law Judge's conclusion that McIntosh was not a member of a crew so as to be excluded from coverage under Section 2(3) of the Act". The Fifth Circuit Court of Appeals after receiving two briefs and hearing oral argument affirmed per curiam. Now this Court is being asked to grant a writ of certiorari and conduct a retrial of the case on the factual issues.

The position of this Court as to such attempts was restated in *Senko v. Lacrosse Dredging Corp.*, 352 US 370, 1 L. Ed. 2d 404, 77 S. Ct. 415 (1957), a case involving an appeal from a jury finding that the plaintiff was a seaman in a Jones Act case. That finding was reversed by an Illinois state appellate court, and on petition for certiorari the United States Supreme Court reversed citing *South Chicago Co. v. Bassett*, Supra, as follows:

> "As we have said before, this Court does not normally sit to re-examine a finding of the

type that was made below. We believe, however, that our decision in *South Chicago Co. v. Bassett* (US) supra, has not been fully understood. Our holding there that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate." (373, 374)

As shown in the recitation of facts in the Decision and Order of September 8, 1975 (Appendix to Petition pages 25a through 27a) the injury occurred to Mr. McIntosh while he was supervising a work crew in a snagging operation on Tom's Creek, a cutoff of the Altamaha River. The operation consisted in the removal of logs, trees, stumps and the like from the creek so as to permit a nuclear reactor to be shipped by barge through Tom's Creek.

The equipment used consisted of a barge with a crane mounted upon it, a tug the "Little Ed", a skiff and a pick up truck. The entire crew ate and slept ashore except for the noon meal eaten at the job site. They travelled to the job site via the truck to a landing and thence by skiff to where they were working. One man, James Shelton, was permanently assigned as crane operator and another, Eddie Rhodes, (also known as Eddie Williams) was the permanent tug boat operator. William Gale and Stephen Hand assisted in attaching the sling of the crane to snags and with loading and unloading logs on the barge. Mr. McIntosh directed the

entire crew. He was injured while they were attempting to pull over and uproot a large oak tree from the bank of the creek when a limb on the tree swung toward him, dislodging a previously loaded log which fell upon the claimant crushing his back and chest and rendering him a paraplegic.

After thoroughly reviewing those facts, the Administrative Law Judge found that Mr. McIntosh was primarily engaged in heavy construction work on navigable waters of the United States, and that the barge upon which the claimant was injured was a work platform and not in navigation. Judge Sullivan did not make up out of thin air the facts upon which he made his findings, they were based upon testimony and evidence in the record.

The Benefits Review Board disagreed that the barge was a work platform and held that it was in navigation. But, the Board upheld the Administrative Law Judge on the finding of fact that McIntosh's "primary duty was to supervise workers engaged in the snagging operation". (Petitioners' Appendix page 8a). The Board found "that there is substantial evidence to support the Administrative Law Judge's determination that McIntosh was not aboard primarily to aid in navigation". (Petitioners' Appendix page 7a) and even further "(a)lthough the results of his duties may have made the river easier to navigate, *he was not aboard primarily to aid in navigation*". (Petitioners' Appendix page 8a, Emphasis Supplied).

In its conclusion the Benefits Review Board held:

> "Therefore, the Board finds the record supports the Administrative Law Judge's conclusion that McIntosh was not a member of a crew so as to be excluded from coverage under Section 2(3) of the Act" (Petitioners' Appendix page 8a)

A retrial of those factual issues in this Court is what petitioners seek by writ of certiorari. Respondent contends that such a retrial by certiorari is neither fitting nor proper. Some years ago the Second Circuit Court of Appeals expressed its attitude in a similar situation as follows:

> "We have here another instance of an attempt on appeal to have us, as to the facts retry a case which has been tried on oral evidence in the Court below. Perhaps someday soon the admiralty bar will become convinced that such attempts are fruitless." *Fodera v. Booth American Shipping Corporation*, 159 F. 2d 795, 797 (1947)

In accordance with that concept and the precepts of *Bassett* and *Senko*, Supra, this Court should deny the Petition for Writ of Certiorari.

2. Whether The Conclusions Of Law Of The Administrative Law Judge, Affirmed By The Benefits Review Board, And Reaffirmed By The United States Fifth Circuit Court Of Appeals Are Proper Subjects For Review By This Court By Writ Of Certiorari?

Judge Sullivan determined that claimant was primarily engaged in an activity normally associated with heavy construction work and that any ancillary acts of seamanship he performed were incidental and minimal in relation to his primary duties. He therefore concluded that Mr. McIntosh was "*not* a member of a crew". (Petitioners' Appendix page 30a) (Emphasis original).

Having so found, the exclusion for the member of a crew of a vessel under Title 33 United States Code Annotated, §902 was inapplicable, and therefore the injury was compensable under the Longshoremen and Harbor Worker's Compensation Act as Amended.

The Benefits Review Board after reviewing the facts (Petitioners' Appendix pages 7a and 8a) likewise found that "McIntosh's primary duty was to supervise the workers engaged in the snagging operation". The Board then concluded from its review of the record "that there is substantial evidence to support the Administrative Law Judge's determination that McIntosh was not aboard primarily to aid in navigation", (Petitioners' Appendix page 7a) and likewise concluded that claimant "was not a member of a crew so as to be excluded from coverage under Section 2(3) of the Act". (Petitioners' Appendix page 3a).

These conclusions of law of both the trier of fact and the primary appeal tribunal are entirely in accord with the case law on this issue.

In this Court's decision in *Bassett* the distinction is made between a member of a crew of a vessel and a harborworker based on the criteria that a crew member is primarily on board to aid in the navigation of the vessel. In interpreting the former Longshoremen and Harbor Worker's Compensation Act on this very point this Court stated in *Bassett:*

> "That is our concern here in construing this particular statute — the Longshoremen and Harbor Worker's Compensation Act — with appropriate regard to its distinctive aim. We find little aid in considering the use of the term "crew" in other statutes having other purposes. This Act as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Co. v. Haverty*, 272 US 50, 71 L. Ed. 157, 47 S. Ct. 19, supra) were still regarded as distinct from members of a "crew". They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by Longshoremen and Harbor Workers and *thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation.*" (pages 259-260) (Emphasis Supplied)

The various circuit courts of appeal have consistently employed the same basic test in making the distinction between those covered by the Act and members of the crew, viz:

"The evidence indicates that Griffith was not aboard the barge primarily to aid in its navigation . . . A worker upon a barge whose primary duties involve the handling of cargo rather than carrying out of required navigational responsibilities is a longshoremen rather than a seaman." *Griffith v. Wheeling Pittsburgh Steel Corporation*, 521 F. 2d 31, 37, (3d Cir. 1975)

"The essential and decisive elements of the definition of a "member of a crew" are that the ship be in navigation; that there be a more or less permanent connection with the ship; *and that the worker be aboard primarily to aid in navigation. McKie v. Diamond Marine Co.*, 204 F. 2d 132, 136 (5th Cir., 1953) (Emphasis Supplied)

> "In the *Bassett* case, the Court noted that the word "crew" did not have 'an absolutely unvarying legal significance' . . . . Nor does it have a well-defined factual significance under the Longshoremen and Harbor Worker's Compensation Act. But, certain guides there are, although they are by no means magic touchstones. The questions concerns the plaintiff's 'actual duties'. Was the plaintiff on board 'naturally and primarily' to aid in the vessel's navigation." *Schantz v. American Dredging Co.*, 138 F. 2d 534, 537, (3d Cir., 1943) (Citations omitted)

In the more recent 1957 decision in *Senko v. Lacrosse Dredging Corp.*, Supra, this Court reaf-

firmed the same criteria of primary duties being determinative in the converse situation in a Jones Act case.

In the light of these decisions the conclusion of the Administrative Law Judge as affirmed by the Benefits Review Board was not only proper, but mandated. The contention of petitioners that the per curiam affirmance by the Fifth Circuit Court of Appeals conflicts with decisions of this Court and other courts of appeal is wholly without merit.

CONCLUSION

The course followed by this case is a monument to the persistency of a party in challenging a factual determination. In their petition to this Court, the employer and carrier are raising for the twelfth time the same factual arguments and contentions attacking the findings of fact at the trial level. Their contentions were made orally following the evidentiary hearing. They were made in writing in a post-trial brief, and again in a post-trial reply brief. They were found not to be supported by the evidence by Judge Sullivan in his findings of fact in the Decision and Order of September 8, 1975.

The same arguments were made in the Petition for Amendment, Correction, and Reconsideration of the Decision and Order and again found not persuasive and rejected in the Supplemental Decision and Order of October 29, 1975.

Petitioners then appealed to the Benefits Review Board and raised the same factual contentions and

arguments in their main brief, reply brief, and on oral argument. They were again found lacking merit and the Board affirmed Judge Sullivan.

The employer and carrier then petitioned the Fifth Circuit Court of Appeals for review and made the same factual arguments in their main brief, reply brief, and on oral argument. The Court of Appeals likewise rejected the arguments and affirmed. Petitioners then filed a Petition for Rehearing En Banc asserting the same contentions, which petition, the Fifth Circuit Court of Appeals denied.

And, now the United States Supreme Court is presented with the same factual challenges and arguments in an effort to retry the case in this Court on the record (specifically that part of the record which petitioners view to be favorable to them) to secure new independent findings of fact and substitute such findings for those of the trier of fact.

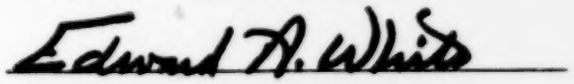
The workmen's compensation benefits recovered by Mr. McIntosh are provided to him by law, the carrier received a premium to extend them, the facts justify them, the Administrative Law Judge awarded them, the Benefits Review Board confirmed them, the Fifth Circuit Court of Appeals affirmed them and this Court, the United States Supreme Court, should guarantee them.

The factual arguments and contentions of the employer and carrier so repeatedly proffered should be finally and permanently rejected. The carrier should be told once and for all that it must respond un-

der its insurance contract and pay Mr. McIntosh the benefits of the Act which the facts justify and for which he has been forced to fight through a trial, two levels of appeal, and now into this Court to secure.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Edward A. White, a member of the Bar of the Supreme Court of the United States do hereby certify that three copies of the foregoing brief of respondent, McIntosh, have been served by mail by depositing the same in a United States mail box with first class postage prepaid, this ____ day of November, 1977, duly addressed to the following:

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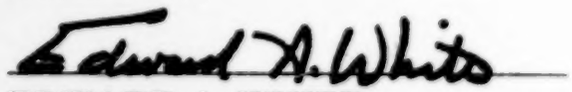

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No. 77-599

In the Supreme Court of the United States

OCTOBER TERM, 1977

PARKHILL-GOODLOE COMPANY, INC., and
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v.

RUDOLPH MCINTOSH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The court of appeals did not write an opinion. The opinion of the Benefits Review Board (Pet. App. 3a-13a) is reported at 4 BRBS 3. The opinion of the administrative law judge (Pet. App. 22a-33a) and his supplemental decision (Pet. App. 15a-22a) are reported in summary form at 2 BRBS (ALJ) 236 and 3 BRBS (ALJ) 59.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1977. A petition for rehearing was denied on May 31, 1977 (Pet. App. 2a-3a). On July 29, 1977, Mr. Justice Powell extended the time within which to file a petition

for a writ of certiorari to and including October 28, 1977. The petition for a writ of certiorari was filed on October 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the administrative law judge that respondent McIntosh was not a "master or member of a crew of any vessel."

STATUTES INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1425, as amended, 86 Stat. 1251, 33 U.S.C. (Supp. V) 902(3), provides in relevant part:

> The term "employee" means any person engaged in maritime employment, * * * but such term does not include a master or member of a crew of any vessel, * * *.

Section 3(a) of the Act, 44 Stat. 1426, as amended, 86 Stat. 1251, 33 U.S.C. (Supp. V) 903(a), provides in relevant part:

> * * * No compensation shall be payable in respect of the disability or death of—(1) A master or member of a crew of any vessel, * * *.

STATEMENT

On February 12, 1975, respondent Rudolph McIntosh sustained serious, permanently disabling injuries in the course of his employment for petitioner Parkhill-Goodloe Co.[1] The injury occurred while McIntosh was working on

[1]The facts of this case are summarized by the Benefits Review Board (Pet. App. 4a-5a) and the administrative law judge (*id.* at 25a-27a).

a barge afloat on Tom's Creek, a cut of the Altamaha River, in Georgia. The barge, attached to the tug *Little Ed* and accompanied by a "runboat" or outboard "skiff," was engaged in removing trees, logs, and other obstructions to navigation in Tom's Creek.

McIntosh had worked for Parkhill-Goodloe Co. for approximately ten years. He had neither a master's license nor seaman's papers, although he was licensed to operate the runboat. He was the supervisor of the Tom's Creek operations. He met the tug, barge, and runboat on the fourth day of their five-day trip up the River to the work site. During the week-long project, McIntosh, together with the men who had traveled up the River by boat—a tug operator, a crane operator, a boatman, and a deckhand—worked eight to ten hours a day, returning each afternoon in the runboat to a landing. They slept in a local motel, and they ate breakfast and dinner ashore.

McIntosh directed the clearing operations from the deck of the barge. He gave hand signals to the tug operator to maneuver the dragline barge into position for the removal of each obstruction, and he supervised the activities of the other workers. The crew uprooted a large oak tree, which gave way and swung aboard; McIntosh jumped down from a pile of logs on the deck, slipped, and fell; the tree struck and dislodged one of the logs, which rolled onto McIntosh, crushing his chest and back. He will be confined to a wheelchair for the rest of his life.

McIntosh filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. Petitioners contended that he was a "master or member of a crew of [a] vessel" and consequently was excluded from the protection of the Act by Sections 2(3) and 3(a)(1). The administrative law judge rejected this contention, concluding that at the time of the injury McIntosh "was

primarily engaged in an activity normally associated with heavy construction work, *i.e.*, the uprooting, by crane, of a large tree" (Pet. App. 30a). He explained that McIntosh's supervision and direction by hand signals to the tug pilot were merely "incidental" to the removal of obstructions (*ibid.*). He further found that the barge was not "in navigation" during the uprooting of the oak tree (*ibid.*). He awarded McIntosh compensation under the Act for permanent total disability (*id.* at 30a-31a), and he adhered to this determination after a petition for reconsideration (*id.* at 15a-20a).[2]

The Benefits Review Board held that the administrative law judge erred in finding that the barge was not "in navigation," but it concluded that the finding that McIntosh was not a master or member of the barge's or tug's crew was supported by substantial evidence (Pet. App. 6a-8a) It affirmed the administrative law judge's award in all respects, and the court of appeals affirmed, in turn, without opinion (Pet. App. 1a-2a).

ARGUMENT

In cases under the Jones Act, 41 Stat. 1007, 46 U.S.C. 688, the question whether a person is a "seaman" or a "member of a crew" is a factual issue on which juries have considerable discretion. *Gianfala* v. *Texas Co.*, 350 U.S. 879; *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370; *Grimes* v. *Raymond Concrete Pile Co.*, 356 U.S. 252; *Butler* v. *Whiteman*, 356 U.S. 271. It seems likely that a jury could have found in McIntosh's favor if he had

[2]The administrative law judge's "Supplemental Decision and Order" did not, as petitioners state (Pet. 3), "revok[e] in its entirety the original Decision and Order." It revoked only the original order and reentered a clarified order. See Pet. App. 19a. The original decision was not altered.

chosen to forswear his workers' compensation remedy and had brought suit, under the Jones Act, claiming to be a seaman.

McIntosh was engaged in activity that had both marine and non-marine aspects. The barge was a special-purpose vessel that was essentially a work platform rather than a means of transportation by water. Its crew may be found to be members of the crew of a vessel, despite the facts that they have no seaman's papers, eat and sleep ashore, are paid by the hour, do not travel with the vessel from place to place when it is moved by power not its own, and are aboard only for a single project in a single place. But the law does not compel the factfinder to reach this conclusion in every case.

The Longshoremen's Act claimant's status as a crew member generally turns on questions of fact within the conclusive authority of the administrative factfinder, so long as his decision is supported by substantial evidence. *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251. The term "member of a crew * * * does not have an absolutely unvarying legal significance" (309 U.S. at 258).

We do not say that the factfinder can decide any case as he pleases. *Norton* v. *Warner Co.*, 321 U.S. 565, on which petitioners heavily rely, held that he may not. But as *Senko* establishes, the factfinder's decision—necessarily resting on particular facts and inferences concerning each particular operation—is entitled to considerable respect. Reviewing courts do not substitute their judgments for that of the agency on the "application of a broad statutory term or phrase to a specific set of facts," even when the question is "more legal than factual in nature" and the basic facts are undisputed, so long as the administrative finding in the individual case has a "reasonable legal basis." *Cardillo* v. *Liberty Mutual*

Insurance Co., 330 U.S. 469, 478-479. See also *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507-508.

The Benefits Review Board fully considered petitioners' contentions on the extensive factual record and determined that one of the administrative law judge's subsidiary determinations—that the dragline barge was not "in navigation" at the time of respondent McIntosh's injury—was contrary to established principles of law. It found substantial evidentiary support and a reasonable legal basis, however, for the finding that McIntosh did not have all the attributes of a master or member of a vessel's crew.[3] The court of appeals concurred, and there is no reason for this Court to review the essentially factual decision on which three lower tribunals have agreed.[4]

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[3]The Board's review of factual decisions of administrative law judges is limited to determining whether their findings are supported by "substantial evidence." 86 Stat. 1261, 33 U.S.C. (Supp. V) 921(b)(3).

[4]There is no conflict among the circuits concerning the controlling legal standard. This standard has been established in the cases discussed in the text, and the Fifth Circuit on several occasions has applied it to hold that a particular claimant was a seaman. See, *e.g.*, *Higginbotham* v. *Mobil Oil Corp.*, 545 F. 2d 422 (C.A. 5); *Boatel, Inc.* v. *Delamore*, 379 F. 2d 850 (C.A. 5). No court of appeals has adopted a legal standard different from that of *Higginbotham* and *Boatel* under which a person is *more* likely to be found to be a seaman. But because each case turns on its facts, those cases do not control here. Even if they did, the present case would establish at most an intra-circuit conflict that does not require review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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